Supreme Court, U.S.
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No. _____

In The Supreme Court of The United States

GERARD JOSEPH PALAZZOLO,
Petitioner,

v.

DAVID G. GORCYCA,
Respondent.

Petition For A Writ Of Certiorari To The United States Court of Appeals For The Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI
with Appendix

*ARTHUR JAY WEISS
ATTORNEY AT LAW
Suite 200
30445 Northwestern Highway
Farmington Hills, Michigan 48334-3175

(248) 855-5888

Attorney for Petitioner
**Counsel of Record*

June, 2001

LEGAL ADVANTAGE • 432 Walnut Street • Cincinnati, OH 45202
(800) 581-2252

221 pp

QUESTION PRESENTED

I.

Does an appellate court have jurisdiction to entertain a prosecution appeal which would adversely impact the accused's constitutional rights against double jeopardy as guaranteed by the fifth amendment to the United States Constitution ?

TABLE OF CONTENTS

Page

QUESTION PRESENTED.....i

TABLE OF CONTENTS.....ii

TABLE OF AUTHORITIES.....iii

OPINION BELOW.....1

JURISDICTION.....1

CONSTITUTIONAL PROVISION INVOLVED.....1

STATEMENT OF THE CASE.....1

REASONS FOR GRANTING THE WRIT.....4

CONCLUSION.....29

APPENDIX.....

TABLE OF AUTHORITIES

Federal Cases

Page

Albernaz v United States 23,26,28
517 US 333, 101 S Ct 1137, 67
L Ed 2d 275 (1981)

Barker v Yukins.....15,27
--F 3d-- (#98-1237 December 15 1999)

Blanton v Elo.....8,30
186 F 3d 712 (6th Cir 1999)

Blockburger v United States 19,23,25
284 US 299, 52 S Ct 180, 76
L Ed 306 (1932)

Brown v O'Dea.....12,15
187 F 3d 572 (6th Cir 1999)

Brown v Ohio.....7,17
432 US 161,97 S Ct 2221, 53
L Ed 2d 187 (1977)

Burks v United States.....15,22
437 US 1 98 S Ct 2141, 57
L Ed 2d 1 (1978)

TABLE OF AUTHORITIES
(Continued)

Federal Cases (Continued)

Page

Cummings v Evans.....10,11
161 F 3d 610 (10th Cir 1998)

DeLisle v Rivers.....21,27
161 F 3d 370
(6th Cir en banc 1998)

Gavieres v United States.....25
220 US 338 31 S Ct 421,
55 L Ed 489 (1911)

Green v United States.....8, 16
355 US 184 78 S Ct 221,
2 L Ed 2d 199 (1957)

Harpster v Ohio.....27
128 F 3d 322, (6th Cir 1997),
cert denied, --US-,118 S Ct 1044,
140 L Ed 2d 109 (1998)

Hawk v Berkemer 19
610 F 2d 445 (6th Cir 1979)

TABLE OF AUTHORITIES
(Continued)

Federal Cases (Continued)

Page

In re Arnett.....12
804 F 2d 1200 (11th Cir 1986)

King v Trippett.....5,29
192 F 3d 517 (6th Cir 1999)

Lee v United States.....14
432 US 23, 97 S Ct 2141,
53 L Ed 2d 80 (1977)

Lindh v Murphy.....25
21 US 320, 117 S Ct 2059,
138 L Ed 2d 481 (1997)

Lindh v Murphy.....18
96 F 3d 856 (7th Cir en banc 1996),
rev'd on other grounds, 521 US 320,
117 S Ct 2059, 138 L Ed 2d 481
(1997)

Mangus v Edwards.....22
40 F Supp 2d 908 (ND Ohio 1999)

TABLE OF AUTHORITIES
(Continued)

Federal Cases (Continued)

Page

Missouri v Hunter.....10
459 US 359,103 S Ct 673,
74 L Ed 2d 535 (1983)

Nevers v Killinger.....5
169 F 3d 352 (6th Cir 1999),
cert denied, --US-119 S Ct 2340,
144 L Ed 2d 237 (1999)

O'Brien v Dubois.....17
145 F 3d 16 1st Cir 1998)

Rutledge v United States.....21,26,28
517 US 292,116 S Ct 1241,
134 L Ed 2d 419 (1996)

Sanabria v United States.....14
437 US 54, 98 S Ct 21 70,
57 L Ed 2d 43 (1978)

TABLE OF AUTHORITIES
(Continued)

Federal Cases (Continued)

Page

Santobello v New York.....12
404 US 257, 92 S Ct 495,
30 L Ed 2d 427 (1971)

Tucker v Prelensik.....28
181 F 3d 747 (6th Cir 1999)

United States v Caraballo-Cruz.....12
52 F 3d 390 (lst Cir 1995)

United States v Dixon.....18,19,26
509 US 688,113 S Ct 2849,
125 L Ed 2d 556 (1993)

United States v Gore.....21,24,27,28
154 F 3d 34 (2d Cir 1998)

United States v Jenkins.....12
420 US 358, 95 S Ct 1006,
43 L Ed 2d 250 (1975)

TABLE OF AUTHORITIES
(Continued)

Federal Cases (Continued)

Page

United States v Martin Linen Supply Co.....12
430 US 564, 97 S Ct 1349, 51 L Ed 2d
642 (1977).....

United States v McLaughlin.....14
164 F 3d 1(DC Cir 1998)

United States v Moriarty.....21,23,26
962 F Supp 217 (D Mass 1997)

United States v Scott.....15
437 US 82, 98 S Ct 2187,
57 L Ed 2d 65 (1978)

Whalen v United States.....28
445 US 684,100 S Ct 1432,
63 L Ed 2d 715 (1980)

TABLE OF AUTHORITIES
(Continued)

State Cases

Page

People v Alvin Johnson.....10,11
396 Mich 424, 240 NW 2d 729
(1976)

People v Bullock.....8,15
440 Mich 15,
485 NW 2d 866 (1992)

People v Howard.....15
212 Mich App 366,
538 NW 2d 44 (1995)

People v Hunt.....18,22,26
170 Mich App 1,
427 NW 2d 907 (1988)

People v Lemon.....27
454 Mich 234,
562 NW 2d 447 (1997)

TABLE OF AUTHORITIES
(Continued)

State Cases (Continued)

Page

People v Rogers.....18,21,22,26
142 Mich App 88,
368 NW 2d 900 (1985)

People v Sturgis.....19,27
427 Mich 392,
397 NW 2d 783 (1986)

Federal Statues

Page

28 USC § 2254.....1

State Statutes

MCLA 750.520.....1,7

Secondary Authorities

McCormick, Evidence (5th ed 1999).....10

OPINION BELOW

The Opinion of the United States Court of Appeals for the Sixth Circuit is reported at 244 F 3d 512 (6th Cir 2001) (Apx A).

JURISDICTION

The Opinion of the United States Court of Appeals for the Sixth Circuit was entered on or about March 27 2001. This Petition for Writ of Certiorari is being filed within ninety (90) days of said date as required by Rule 13.1 of the Supreme Court Rules. The Jurisdiction of this Court is invoked to 28 USC § 1254 (1).

CONSTITUTIONAL PROVISION INVOLVED

The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution provides, in pertinent part, no person shall "be subject for the same offence to be twice put in jeopardy of life or limb."

STATEMENT OF THE CASE

1. The Petitioner, GERARD JOSEPH PALAZZOLO, was charged in an one (l) count information with first-degree criminal sexual conduct, MCLA 750.520b (l)(a).

2. The evidence adduced at the preliminary examination indicated Lisa Renée Palazzolo, age twelve (12) years old (Apdx. L), was touched in her vaginal area (Apdx. L) on one (1) occasion (Apdx. L) by your Petitioner during sometime around June 1995 (Apdx. L). This touching transpired over Ms Palazzolo's clothing (Apdx. L); there was no "skin-to-skin" touching. While the complainant did not testify as to any penetration, the Court—over objection (Apdx. L)—admitted a confession of GERARD PALAZZOLO indicating, during an unspecified period of time, digital penetration of the complainant and her sister.

3. After being "bound-over" to the Oakland County Circuit Court, Mr Palazzolo's counsel submitted a Motion to Quash Information or in the Alternative to Reduce the Charge, the crux of which was the admissibility of the aforementioned exhibits. On or about May 6 1997, the Honorable Nanci J Grant issued an opinion and order reducing the offense to second-degree criminal sexual conduct

4. The prosecution effectuated no interlocutory appellate proceedings whatsoever. On or about June 16 1997, GERARD PALAZZOLO proffered a nolo contendere plea to the "reduced" charged (Apdx J). Significantly, during this proceeding, the prosecution advised the trial judge, defense counsel and GERARD PALAZZOLO, by proffer of his plea, "[t]he Defendant...[was] not consenting to an appeal or anything"

and was "not waiving any claims or rights" thereby (Apdx.J).

5. On or about July 23 1997, a lengthy sentencing hearing was conducted by the Circuit Court, at the conclusion of which, GERARD JOSEPH PALAZZOLO was sentenced, inter alia, to "3 years probation, 1 year in jail, one day credit, balance of sentenced suspended after 6 months in order to enter electronic monitoring program...and participat[ion]...in a mental health treatment program." (Apdx. K)

6. Subsequently, the prosecution submitted a claim of appeal, which was dismissed "for lack of jurisdiction". The Michigan Court of Appeals did, however, grant their delayed application for leave to appeal and without benefit of oral argument reversed and reinstated the first-degree criminal sexual conduct accusation.

7. Thereafter, the Michigan Supreme Court denied your Petitioner's Application for Leave to Appeal.

8. On or about July 26 1999, the Honorable Paul D Borman, United States District Court for the Eastern District of Michigan, denied GERARD PALAZZOLO's Petition for Writ of Habeas Corpus but did issue a Certificate or Appealability (Apdx. C).

9. Subsequently, on or about March 27 2001, the United States Court of Appeals for the Sixth Circuit issued an opinion affirming the decision of the District Court.

REASONS FOR GRANTING PETITION

I. JURISDICTION TO ENTERTAIN A PROSECUTION APPEAL WHICH WOULD ADVERSELY IMPACT THE ACCUSED'S CONSTITUTIONAL RIGHTS AGAINST DOUBLE JEOPARDY AS GUARANTEED BY THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution, commands that no person shall "be subjected for the same offense to be twice put in jeopardy of life or limb," US Const amend V, and applies to state prosecutions through the Fourteenth Amendment. Benton v Mayland, 395 US 784, 89 S Ct 2056, 23 L Ed 2d 707 (1969). The Double Jeopardy Clause serves a number of purposes. It precludes the State from making "repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity." United States v Dintz, 424 US 600, 606, 96 S Ct 1075, 1079, 47 L Ed 2d 267 (1976) (quoting Green v United States, 355 US 184,

187, 78 S Ct 221, 223, 2 L Ed 2d 199 (1957)). Harpster v Ohio, 128 F 3d 322, 327 (6th Cir 1997), cert denied, --US--, 118 S Ct 1044, 140 L Ed 2d 109 (1998) (Emphasis added)

A.

1. The Michigan Court of Appeals, pursuant to MCR 7.214 (E), rotely opined "when a plea and sentencing occur on a reduced charge, and the basis for the reduction is later overturned on appeal, jeopardy does not attach." (Citation omitted). With all due respect, GERARD JOSEPH PALAZZOLO respectfully objects.

2. Inasmuch as issues of constitutional law are legal questions for the Court, the complained of conclusion by the Michigan Court of Appeals is to be reviewed de novo by this Court with limited deference being accorded thereto.

Without even a mention of federal constitutional jurisprudence and no indication an examination of the specific factual scenario of this prosecution was conducted, GERARD JOSEPH PALAZZOLO respectfully submits the relevant "state court determination" is "so devoid of record support, or so arbitrary, as to indicate that it is outside the universe of plausible, credible outcomes," Nevers v Killinger, 169 F3d 352, 362 (6th Cir 1999), cert denied,--US--, 119 S Ct 2340, 144 L Ed 2d 237 (1999) (Citation omitted).

B.

1. It is evident while "[t]he constitution secures to a defendant in a criminal case a right of appeal, [it] does not provide for an appeal by the people. The people may appeal only to the extent provided by statute." People v Cooke, 419 Mich 420, 424-425, 355 NW 2d 88 (1984)(Footnotes omitted). Accord: Arizona v Manpenny, 451 US 232, 245-246, 101 S Ct 1657, 68 L Ed 2d 58 (1981); United States v Wilson, 420 US 332, 336, 95 S Ct 1013, 43 L Ed 2d 232 (1975).

2. In Michigan, MCLA 770.12 prohibits the prosecution from effectuating an appeal unless "the protection against double jeopardy under section 15 of article 1 of the state constitution of 1963 and amendment V of the constitution of the United States would not bar further proceedings against the defendant...." Although Mr Palazzolo proffered a nolo contendere plea during earlier proceedings (Apdx. J), and MCR 6.312 does not explicitly contain a similar double jeopardy limitation, such a restriction has been judicially construed, People v Siebert, 201 Mich App 402, 425 n 17, 507 NW 2d 211 (1993), modified on other grounds, 450 Mich 500, 537 NW 2d 891 (1995). Accordingly, it is incumbent to analyze applicable double jeopardy principles.

C.

1. A fundamental maxim of double jeopardy jurisprudence is the attachment of "jeopardy to a guilty plea conviction when sentence is imposed See, United States v Bullock, 579 F 2d 1116, 1118 (8th Cir 1978), cert denied,

439 US 967, 99 S Ct 456, 58 L Ed 2d 425 (1978); United States v Wright, 902 F Supp 205, 206 (D Or 1995); Ragin v United States, 893 F Supp 570, 574 (WD NC 1995), aff'd, 106 F 3d 393 (4th Cir 1997).[1]

2. Similarly, a "trial court's" acceptance of a defendant's plea to a lesser charge and imposition of a sentence on that charge bars subsequent prosecution on the greater charge, Brown v Ohio, 432 US 161, 97 S Ct 2221, 53 L Ed 2d 187 (1977).

3. .In the instant cause, GERARD PALAZZOLO proffered a plea to second-degree criminal sexual conduct, MCLA 750.520c, premised upon insufficiency of evidence presented during the preliminary examination and subsequent to a then unappealed ruling of the trial court. He has been sentenced (Apdx. K) and has already completed the incarceration portion of said sentence. Accordingly, it is Mr Palazzolo's contention the prosecution's appeal was violative of his constitutional guarantees against double jeopardy as guaranteed by the fifth amendment to the United States Constitution, see, Grady v Corbin, supra, 495 US at 521-523; Brown v Ohio, supra, 432 US at 167-169, as well as art 1, § 15 of the Michigan Constitution of 1963, see, People v Cook, supra, 236 Mich at 335-336; People v Bower, supra, 3 Mich App at 587-589.

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[1]The prosecution below conceded jeopardy had attached (Apdx. C).

4. After all, it must be remembered the statute, MCLA 770.12, and court rule, MCR 6.312, employed by the prosecution to assert before the Michigan appellate judiciary "[t]here are no double jeopardy concerns in this case....", cannot be construed "to expand the government's right to appeal beyond the prohibition of the jeopardy clause...." United States v Esposito, 492 F 2d 6, 7 (7 th Cir 1973), cert denied, 414 US 1135, 94 S Ct 879, 38 L Ed 2d 760 (1974). Accord: United States v Sisson, 399 US 267, 293-299, 90 S Ct 2117, 26 L Ed 2d 608 (1970); Will v United States, 389 US 90, 96, 88 S Ct 269, 19 L Ed 2d 305 (1967).

D.

1. The instant appeal does not present a situation wherein an accused appeals his conviction, thus "waiving" any double jeopardy concerns in a retrial. Green v United States, 355 US 184, 189, 78 S Ct 221, 2 L Ed 2d 199 (1957). Nor does the pertinent Petition present a scenario where the accused sought "early" termination of the proceedings, e g, defense motion for mistrial. See, e g, United States v Martin Linen Supply Co, 430 US 564, 570, 97 S Ct 1349, 51 L Ed 2d 642 (1977).

2. The prosecution clearly and unequivocally advised the trial judge, defense counsel and GERARD JOSEPH PALAZZOLO by the proffer of a plea, "[t]he Defendant...[was] not consenting to an appeal or anything" and was "not waiving any claims or rights" thereby (Apdx. J). Consequently, by interposing a double jeopardy objection to the prosecution's complained of appeal, no

realistic argument could be predicated Mr Palazzolo "is responsible for the [complained of] second prosecution," United States v Scott, 437 US 82, 98 S Ct 2187, 57 L Ed 2d 65 (1978), reh den, 439 US 883, 99 S Ct 226, 58 L Ed 2d 197 (1978), or he desires constitutional protection "from the consequences of his voluntary choice," Id at 99.

3. Accordingly, the conduct of your Petitioner can in no reasonable way be deemed or construed as a "waiver" or "consent" to the complained of "second prosecution." See, Ricketts v Adamson, 483 US 1, 7-10, 107 S Ct 2680, 97 L Ed 2d 1 (1987).

4. While the prosecution suggested to the District Court your Petitioner somehow "waived" and/or "consented" to what transpired, it is interesting to note, however, they at no time referenced the remarks of their own assistant prosecutor who handled the matter.

5. At the time the nolo contendere plea was scheduled to transpire, the assistant prosecutor, for the first-time, articulated references to a potential appeal (Apdx. J). When the defense objected and did not want to proceed (Apdx. J), the prosecutor significantly responded: "I don't think it has any bearing on the Defendant. The Defendant is not waiving any claims or rights by tendering a plea today...." (Apdx. J) (Emphasis added). This statement by the Respondent constitutes a judicial admission which is not subject to being diluted, see generally, McCormick on Evidence § 254 (4th ed 1992), and is conclusive, id.

6. Nonetheless, the District Court appeared to suggest these remarks were simply "ships-passing-in-the-

night" (Adpx. C) and the verbiage did not "mean what was articulated" (Apdx. C). With all respect to this jurist, we must not lose sight of the fact for at least a quarter-of-a-century, the jurisprudence in Michigan has been a plea does not waive double jeopardy issues. See generally, People v Alvin Johnson, 396 Mich 424, 440-445, 240 NW 2d 729 (1976); People v White, 212 Mich App 298, 536 NW 2d 876 (1995). Moreover, the prosecution must be held accountable for the assurances it proffers to an accused and construction thereof cannot be rendered a mere nullity, see, e g, In re Arnett, 804 F 2d 1200, 1203 (11th Cir 1986); Cooper v United States, 594 F 2d 12, 15-19 (4th Cir 1979); United States v Bowler, 585 F 2d 851, 854 (7th Cir 1978), which would transpire in light of Michigan jurisprudence and the specific, unequivocal statements spoken by the assistant prosecutor in charge of the matter and obviously relied upon by GERARD PALAZZOLO in proceeding thereafter.

7. To ratify the analysis of the Sixth Circuit would unconstitutionally "fly-in-the-face" of these time honored maxims. See, Palazollo v Gorcyca, 224 F 3d 512, 516-518 (6th Cir 2001). Query how the Court of Appeals could reasonably opine Mr Palazzolo "deliberately choose to seek termination of the proceedings against him...." id at 517 (citation omitted), when, the cold-hard-reality of the transcript unequivocally demonstrates defense counsel refused to proceed with the plea (Apdx. J) until AFTER securing the specific and crucial prosecutorial assurances (Apdx. J).

8. While the appellate court merely opted to criticize your Petitioner's construction of the prosecution's statements, id at 518, the Court failed to recognize its interpretation rendered said utterances an unacceptable nullity, see, In re Arnett, supra, 804 F 2d at 1203; Cooper v United States, supra, 594 F 2d at 15-19; United States v Bowler, supra, 585 F 2d at 854, for the Sixth Circuit's "spin" merely placed GERARD PALAZZOLO in precisely the same position if the assurances had not been spoken, see generally, People v Alvin Johnson, supra, 396 Mich at 440-445; People v White, supra, 212 Mich App at 305. Since your Petitioner would not proceed with the plea without the pertinent representations, query how they can been be deemed non-existent!

9. Similarly, with rote reference to Serafass v United States, 420 US 377, 393, 96 S Ct 1055, 43 L Ed 2d 265 (1975), the Court of Appeals noted "an accused must suffer jeopardy before he can suffer double jeopardy." Palazzolo v Gorcyca, supra, 244 F 3d at 517. Presumably, the Court felt Mr Palazzolo had not "suffered jeopardy." Incredibly, not only is this contrary to established constitutional precedent, see, e g, United States v Bullock, supra, 597 F 2d at 1118; United States v Wright, supra, 902 F Supp at 206; Ragin v United States, supra, 893 F Supp at 574, it also ignores the crucial prosecutorial concession articulated on-the-record below acknowledging the attachment of jeopardy PRIOR to the commencement of their complained of appeal (Apdx. C).

10. Consequently, our reliance (Apdx. J) upon the stated remarks is reasonable herein and Respondent's argument to the contrary is without merit. United States v Caraballo-Cruz, 52 F 3d 390, 392-393 (lst Cir 1995); United States v White, 914 F 2d 747 (6th Cir 1990). Moreover, inasmuch as the now apparently successful appeal would have the obvious affect of mandating "further proceedings of some sort, devoted to the resolution of factual issues going to the elements of the offense charged....," United States v Jenkins, 420 US 358, 370, 95 S Ct 1006, 43 L Ed 2d 250 (1975), such a consideration would further indicate an adverse impact upon your Petitioner's double jeopardy rights, United States v Martin Linen Supply Co, supra, 430 US at 571-576. See also, Smalis v Pennsylvania, 476 US 140, 145-146, 106 S Ct 1745, 90 L Ed 2d 116 (1986).

E.

1. The Oakland County Circuit Court issued the pertinent opinion and order on or about May 6 1997. The prosecution's appellate application was not submitted until approximately four (4) months thereafter. No explanation has been articulated as to why the complained of appeal was not referred to the prosecution's "appellate section" until after GERARD JOSEPH PALAZZOLO proffered his plea, was sentenced and commenced serving a term of imprisonment It is evident the purposeful delay by the prosecution caused your Petitioner to now suffer the consequences of a potential violation of his rights against double jeopardy. In fact, had the prosecution sought

immediate appellate review of the pertinent decision, Mr Palazzolo would not be required to advance the instant double jeopardy issue. See, People v Wolfe, 156 Mich App 225, 229, 401 NW 2d 283 (1986).[2]

2. Surely, the present situation does not arise due to any "questionable conduct" on behalf of the trial court, see, e g, United States v Kington, 835 F 2d 106, 108-109 (5th Cir 1988), nor "waivers" by GERARD JOSEPH PALAZZOLO (PT 6), United States v Shears, 762 F 2d 397, 399-400 (4th Cir 1985).

3. Therefore, as a result of dilatory, bad-faith on behalf of the prosecution in initiating the complained of appeal after GERARD JOSEPH PALAZZOLO's jeopardy rights had attached, constitutes prosecutorial "over-reaching" warranting dismissal of the stated appeal, see, United States v Martinez, 667 F 2d 886, 889-890 (10th Cir 1981), cert denied, 456 US 1008, 102 S Ct 2301, 73 L Ed 2d 1304 (1981); United States v Kessler, 530 F 2d 1246, 1255-1257 (5th Cir 1986), reh den, 535 F 2d 660 (5th Cir 1986). Such is an accurate recitation of applicable jurisprudence regardless of how "egregiously erroneous"

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[2] The federal counterpart to MCLA 770.12, 18 USC § 3731, has been accorded a similar construction to that given the Michigan Statute. United States v Kington, 801 F 2d 733, 735 (5th Cir 1986), reh den, 806 F 2d 261 (5th Cir 1986), cert denied, 481 US 1014, 107 S Ct 1888 95 L Ed 2d 495 (1987).

the ruling of the trial court may have been.[3] See, e g, Sanabria v United States, 437 US 54, 75, 98 S Ct 2170, 57 L Ed 2d 43 (1978)(Citation omitted). See also, United States v Ember, 726 F 2d 522, 523-525 (9th Cir 1984); Virgin Island v Christensen, 673 F 2d 713, 717-718 (3d Cir 1982); United States v Fayer, 523 F 2d 661, 663-664 (2d Cir 1975).

> Even if [Appellant's]...prosecution exception... enunciated in United States v Boldin was not barred by double jeopardy, it would have been prohibited under the due diligence Boldin, 772 F 2d [719, 732 (11th Cir 1985), cert denied, 475 US 1048, 106 S Ct 1269, 89 L Ed 2d 577 (1986)]. In Boldin, the court implied that the government was subject to a due diligence requirement that prevented it from bringing multiple prosecutions, even in the absence of a double jeopardy bar, wherethe

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[3] For purposes of MCR 7.205 (F)(1), the prosecution failed to provide any explanation whatsoever as to why it waited until after the trial court sentenced Mr Palazzolo. People v Gorka, 381 Mich 515, 520, 164 NW 2d 30 (1968). The "blunders" of the prosecutor's office do not constitute "good cause" for the complained of delay which now adversely impacts upon constitutional guarantees. See, Midwest Mental Health v BC-BS, 119 Mich App 671, 674-675, 326 NW 2d 599 (1982); First Bank of Cadillac v Benson, 81 Mich App 550, 555, 265 NW 2d 413 (1978).

> government "knew or should have known of the appellants' participation in a continuing series of [criminal] violations...at the time of the prior prosecutions. Id (citing Jeffers [v United States, 432 US 137, 152, 97 S Ct 2207, 53 L Ed 2d 168 (1977)] and [United States v] Stricklin, [591 F 2d 1112, 1124 (5th Cir 1979), cert denied, 444 US 963, 100 S Ct 449, 62 L Ed 2d 375 (1979). United States v Reed, 980 F 2d 1568, 1580 (11th Cir 1993).

F.

1. Without benefit of oral argument, the Michigan Court of Appeals, pursuant to MCR 7.214 (E) and with cursory citation to People v Howard, 212 Mich App 365, 370, 538 NW 2d 44 (1995), opined "when a plea and sentencing occur on a reduced charge, and the basis for the reduction is later overturned on appeal, jeopardy does not attach." Inasmuch as this decision conflicts with the jurisprudence of the fifth amendment to the United States Constitution—as well as decisions construing art 1, § 15 of the Michigan Constitution of 1963—relief should be accorded to your Petitioner at bar.

2. In examining the Howard opinion and the cases cited therein, it appears Michigan jurisprudence on this issue emanates from People v McMiller, 389 Mich 425, 434, 208 NW 2d 451 (1973) and the Guilty Plea Cases, 395

Mich 96, 137-138, 235 NW 2d 132 (1975).[4] GERARD PALAZZOLO contends the judiciary is of the belief if the prosecutor proffers an objection and the accused nonetheless proceeds with his plea, a waiver of applicable double jeopardy guarantees is opined. See, People v McMiller, supra, 389 Mich at 434; Guilty Plea Cases, supra, 395 Mich at 137-138; People v Thornton, 403 Mich 389, 394, 269 NW 2d 192 (1978). See also, Bateman v Arizona, 429 US 1302, 1305-1306, 97 S Ct 1, 50 L Ed 2d 32 (1976); Forman v United States, 361 US 418, 425-426, 80 S Ct 481, 4 L Ed 2d 412 (1960).

3. However, in the instant cause, the assistant prosecutor handling this prosecution specifically and unequivocally articulated and guaranteed to the Court, defense counsel and Mr Palazzolo—upon which your Petitioner and his counsel reasonably and understandably relied—proceeding with the plea was not to be construed as a "consent" and was not to be deemed a "waiv[er of] any claims or rights" (Apdx. J). Consequently, it is simply not permissible on the basis of the record herein to judicially opine the non-applicability of double jeopardy protection. See, Green v United States, 355 US 184, 191-192, 78 S Ct 221, 2 L Ed 2d 199 (1957). See also, Johnson v Zerbst, 304 US 458, 464-465, 58 S Ct 1019, 82 L Ed 1461 (1938);

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[4] An examination of the Staff Comment to MCR 6.312 appears to indicate this court rule was premised, at least in part, on the precedential affect of these decisions of the Michigan Supreme Court

Lovinger v Circuit Court, supra, 845 F 2d at 744; Pugliese v Perrin, supra, 567 F Supp at 1343-1344.

4. More specifically, the Oakland County Circuit Court correctly determined the crucial element of penetration could not be properly established. See, People v Anderson, 409 Mich 474, 481-482, 295 NW 2d 482 (1980). Given the prosecution's unequivocal assurance by proceeding with the proffer of a nolo contendere plea he "was not waiving any claims or rights" thereby (Apdx. J), surely no one could reasonably contend GERARD JOSEPH PALAZZOLO engaged in a "strategic decision" the results of which would cause a judicially-construed waiver of applicable constitutional protections.

5. Accordingly, due to the specific factual presentations contained herein, no "waiver" transpired at bar, see, Johnson v Zerbst, supra, 304 US at 464; and no judicial impediment should be opined circumventing the traditional notion of attachment of "jeopardy" pursuant to a plea-based-conviction when sentence is imposed. United States v Bullock, supra, 579 F 2d at 1118; United States v Wright, supra, 902 F Supp at 206; Ragin v United States, supra, 893 F Supp at 574.

6. Consequently, reinstatement of the original first-degree criminal sexual conduct accusation is constitutionally prohibited. See, Brown v Ohio, supra.

7. Moreover, inasmuch as Mr Palazzolo has now completed his term of incarceration, the problems manifested herein are even more egregious. Had the prosecution sought immediate appellate review, this

situation could have been completed avoided! If the practice criticized by your Petitioner is accorded approval and/or credence by this Court, query what limitations, if any, could be placed upon prosecutorial over-reaching; query when criminal prosecutions would effectively be concluded; query what if the prosecution instituted its appellate requests years after the conclusion of the trial court proceedings. In reality, the prosecution now desires "open-ended" authorization to secure appellate review of trial court rulings it disagrees with WHENEVER it wants without genuine explanation or effective recrimination. Surely neither applicable constitutional principles nor reasonable jurisprudence should countenance such a draconian situation. See, Almeda v Blubaum, 400 F Supp 177 (D Ariz 1975). See also, United States v Reed, supra, 980 F 2d at 1580.

G.

1. The Respondent below spilled considerable ink over your Petitioner's analysis and the viability of the "same transaction test." While Mr Palazzolo concedes United States v Dixon, 509 US 688, 704, 113 S Ct 2849, 125 L Ed 2d 556 (1993), overruled Grady v Corbin, 495 US 508, 110 S Ct 2084, 109 L Ed 2d 548 (1990), we respectfully submit, for purposes of legislative intent and its inter-relationship with the concept of double jeopardy, the thrust of GERARD PALAZZOLO's argument comports with current constitutional jurisprudence of their.

2. In 1974, the Michigan Legislature amended the Michigan Penal Code and enacted sweeping reform of

criminal sexual conduct proscription. See generally, G Gillespie, Michigan Criminal Law and Procedure § 2202 et seq (2d ed 1995). Pursuant to this scheme, a single sexual act may constitute but one (l) criminal offense, see, People v Rogers, 142 Mich App 88, 368 NW 2d 900 (1985); People v Anderson, 111 Mich App 671, 314 NW d 723 (198l). Similarly, the legislature authorized but one (l) punishment for a single sexual event. People v Hunt, 170 Mich App 1, 427 NW 2d 907 (1988).

3. Moreover, art 1, § 15 of the Michigan Constitution of 1963, employs the "same transaction test" for purposes of double jeopardy analysis. See generally, People v Bullock, 440 Mich 15, 28, 485 NW 2d 866 (1992); People v Sturgis, 427 Mich 392, 401, 397 NW 2d 783 (1986). Significantly, this test has been utilized by the Michigan Supreme Court since 1973 with the filing of an opinion in People v White, 390 Mich 245, 259, 212 NW 2d 222 (1973), which was prior to the date in 1974 when the Michigan Legislature codified the current criminal sexual conduct enactment, MCLA 750.520a et seq.

4. In the instant appeal, your Petitioner was originally charged in a single-count information alleging but one (l) criminal sexual event. Unlike the situation presented in Ohio v Johnson, 467 US 493, 104 S Ct 2536, 81 L Ed 2d 425 (1984), reh den, 468 US 1224, 105 S Ct 20, 82 L Ed 2d 915 (1984), when the trial court "reduced" the offense from first-degree criminal sexual conduct to second-degree and the Defendant proffered a nolo

contendere plea thereto, there were no remaining unresolved accusations.

5. Second-degree criminal sexual conduct is a cognate lesser offense of first-degree. People v Wilhelm, 190 Mich App 574, 476 NW 2d 753 (1991). Respondent, simply because second-degree is not a necessarily lesser included offense of first-degree criminal sexual conduct, People v Norman, 184 Mich App 255, 457 NW 2d 136 (1990), attempts to employ United States v Dixon, supra, 509 US at 697-712, to automatically bar the relief we request herein. However, such a niggardly view of Blockburger v United States, 284 US 299, 52 S Ct 180, 76 L Ed 306 (1932), is neither warranted nor constitutionally appropriate.

6. Initially, we would note the differences between the Blockburger and Grady analyses have been previously opined by the Sixth Circuit to be not "substantial". See, e g, United States v Easley, 942 F 2d 405, 408 (6th Cir 1991).

> The Supreme Court's decision in Grady, does not substantially alter this court's precedent interposing the requirements of the double jeopardy clause in subsequent prosecutions. In 1980, just after the Supreme Court modified the Blockburger test in [Illinois v Vitale, 447 US 410, 100 S Ct 2260, 65 L Ed 2d 228 (1980), our court explained the

> nature of those modifications in an opinion by Judge Merritt in Pandelli v United States, 635 F 2d 533, 538 (6th Cir 1980). In Pandelli, we stated that courts must look to the theory of criminal liability underlying the Prosecution's case rather than looking abstractly at the statutes to be applied. What the reviewing court must now do in applying Blockburger is go further and look to the legal theory of the case or the elements of the specific criminal cause of action for which the defendant was convicted without examining the facts in detail. (Emphasis supplied by the Court).

7. A portion of this relevant analysis must recognize the principle "'[w]hen legislative intent is ambiguous, the rule of lenity prescribes that doubt will be resolved against turning a single transaction into multiple offenses, and therefore in favor of combining multiple factual predicates into the same. See, Bell v United States, 349 US 81, 83-84, 75 S Ct 620, 622-23, 99 L Ed 905 (1955). United States v Duncan, 850 F 2d 1104, 1108 n 4 (6th Cir 1988)." United States v Hebeka, 25 F 3d 287, 290 (6th Cir 1994).

8. In the appeal at bar, GERARD PALAZZOLO has already been convicted of second-degree criminal sexual conduct, whose elements are virtually identical to

those contained in the offense which Respondent desires to convict him in the future. See, People v Wilhelm, supra. Given the obvious legislative intent to effectuate but one (1) conviction for a single sexual act, People v Rogers, supra; People v Anderson, supra, and the state's employment of the "same transaction test," People v White, supra, 390 Mich at 259, clearly demonstrates the "substantial overlap" of factual predicates and critical elements between the two (2) offenses—first-degree and second-degree criminal sexual conduct—present a "substantial claim" of double jeopardy violation, Illinois v Vitale, 447 US 410, 421, 100 S Ct 2260, 65 L Ed 2d 228 (1980), to which relief is available, see, e g, Cummings v Evans, 161 F 3d 610, 614-617 (10th Cir 1998); United States v Gore, 154 F 3d 34, 41-47 (2d Cir 1998); United States v Moriarity, 962 F Supp 217, 218-221 (D Mass 1997). See also, Rutledge v United States, 517 US 292, 116 S Ct 1241, 134 L Ed 2d 419 (1996); Prince v United States, 352 US 322, 77 S Ct 403, 1 L Ed 2d 70 (1957).

9. If the prosecution's theory herein was to be sustained by this Court, it would undoubtedly allow for multiple criminal-sexual-conduct allegations against an accused emanating from a single event. However, such a scenario would be contrary to both legislative intent and applicable jurisprudence. People v Hunt, supra; People v Rogers, supra; People v Anderson, supra.

10. We cannot lose sight of the fact we are in this cause dealing with a single statutory scheme and a single occurrence. As such, the predominant "concern is not

multiple charges under separate statutes, but rather successive prosecutions for conduct that may constitute the same act or transaction" in which case, this Court has opined "the Blockburger test is insufficient...." Rashad v Burt, 108 F 3d 677, 679-680 (6th Cir 1997), cert denied, -- US--, 118 S Ct 850, 139 L Ed 2d 751 (1998). In other words, "multiple charges that satisfy the Blockburger standard, and thus may properly be joined in a single prosecution, may nevertheless violate double jeopardy if prosecuted successively." Id at 680 (Citations omitted).[5]

11. Accordingly,"[t]he Blockburger standard...does not help us resolve a double jeopardy inquiry involving successive prosecutions" where the proper "concern...is whether a defendant is being prosecuted twice for the same act or transaction." Id at 680. It is evident, given the factual scenario presented herein, GERARD PALAZZOLO cannot, therefore, be re-prosecuted as requested by Respondent.

H.

1. In Blockburger v United States, 284 US 299, 304, 52 S Ct 180, 76 L Ed 306 (1932), the Supreme Court opined "[t]he applicable rule is that where the same act or

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[5] "The issue in Rashad was whether the defendant had committed one as opposed to two discrete violations of the same statute, not whether the defendant was charged twice for the same violation." United States v Forman, 180 F 3d 766, 769 (6th Cir 1999).

transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is that each provision requires proof of an additional fact which the other does not." However, this standard "is often easier to state than apply, a point most recently shown when a splintered majority of the Supreme Court could not agree on how the test should be effectuated." United States v Moriarity, supra, 962 F Supp at 218 (Citation omitted).

2. Moreover, "although the Blockburger test is primarily a rule of statutory construction, it does not govern if the analysis is overcome by a clear indication of contrary legislative intent. Albernaz v United States, 450 US 333, 340, 101 S Ct 1137, 1142-43, 67 L Ed 2d 275 (1981)." Id at 218. In other words, "the [Blockburger] rule should not be controlling where...there is a clear indication of contrary legislative intent." Missouri v Hunter, 459 US 359, 367, 103 S Ct 673, 74 L Ed 2d 535 (1983). See also, Catala Fonfrias v United States, 951 F 2d 423, 426 (lst Cir 1991); United States v Sadlier, 649 F Supp 1560, 1563 (D Mass 1986).

> The Blockburger test functions both as a rule of statutory construction and a constitutional presumption. As a tool of statutory construction, the Blockburger test is not absolutely controlling.See, e g, [Albernaz v United States, 450 US 333, 340, 101 S Ct 1137, 67 L Ed 2d 275 (1981)]. In particular, failing the

> Blockburger test does not necessarily imply that two provisions may not be applied together, as the ultimate question is oneof legislative intent. United States v McLaughlin, 164 F 3d 1, 8 (DC Cir 1998).

Since the gravemen here is legislative intent, an examination of the criminal sexual conduct enactment demonstrates we have but one (1) statutory scheme "structured in such a way as to [not] criminalize successie stages of a single undertaking." United States v Gore, supra, 154 F 3d at 46. Rather, while the focus on first-degree criminal sexual conduct is penetration, the concern of second-degree is sexual contact, People v Ward, 206 Mich App 38, 42, 520 NW 2d 363 (1994), the Michigan Legislature did not intend to impose multiple punishments for what is essentially a single event, People v Robideau, 419 Mich 458, 485-488, 355 NW 2d 592 (1984); People v Ward, supra, 206 Mich App at 42-43.

3. It is evident, therefore, given Respondent's analysis herein, it would appear appropriate to charge your Petitioner with both first and second-degree criminal sexual conduct for this specific factual presentation. Yet, Michigan jurisprudence would most definitely prohibit such a situation. See, e g, People v Stewart, 400 Mich 540, 548-549, 256 NW 2d 31 (1977); People v Martin, 398 Mich 303, 307, 247 NW 2d 303 (1976).

4. Surrounded by such clear demonstration of legislative intent, it is obvious double jeopardy principles preclude the conviction of both first and second-degree

criminal sexual conduct in the instant cause. See, Illinois v Vitale, supra, 447 US at 420-421

5. Accordingly, the Court of Appeals' reliance upon Ohio v Johnson, 467 US 493, 104 S Ct 2536, 81 L Ed 2d 425 (1984), Palazzolo v Gorcyca, supra 244 F 3d at 519-521, is inapposite. Similarly, their desire to designate Brown v Ohio, supra, as "clearly and immediately distinguishable from" the instant cause, Pallazzolo v Gorcyca, supra, 244 F 3d at 519, cannot be countenanced.

I.

1. The Supreme Court of the United States in Brown v Ohio, 432 US 161, 166, 97 S Ct 2221, 53 L Ed 2d 187 (1977), quoting from Blockburger v United States, 284 US 299, 304, 52 S Ct 180, 76 L Ed 306 (1932), which in turned relied upon Gavieres v United States, 220 US 338, 342-343, 31 S Ct 421, 55 L Ed 489 (1911), held "[t]he applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provisions requires proof of a fact which the other does not." (Emphasis added).

2. However, this "Blockburger test" is "often easier to state than apply, a point most recently shown when a splintered majority of the Supreme Court could not agree on how the test should be effectuated. See United States v Dixon, 509 US 688, 113 S Ct 2849, 125 L Ed 2d 556 (1993)." United States v Moriarty, 962 F Supp 217, 218 (D Mass 1997). Moreover, we cannot lose sight of the

universal concession the "Blockburger test" is merely "a rule of statutory construction [and] does not govern if the analysis is overcome by a clear indication of contrary legislative intent. Albernaz v United States, 450 US 333, 340, 101 S Ct 1137, 1142-43, 67 L Ed 2d 275 (1981)." Id at 218.

3. Given this analytical framework, as an initial matter, for Blockburger to be applicable, we must have under consideration "two distinct statutory provisions." Rutledge v United States, 517 US 292, 297, 116 S Ct 1241, 134 L Ed 2d 419 (1996). Yet, in the instant cause, we dealing with a single statutory scheme wherein a single "act" may constitute but one (1) offense, see, People v Rogers, 142 Mich App 88, 368 NW 2d 900 (1985), and receive but one (1) punishment, People v Hunt, 170 Mich App 1, 427 NW 2d 907 (1988). This all transpires within an state-constitutional-environment which employs the "same transaction test" for purposes of double jeopardy proscriptions, art 1, § 15 of the Michigan Constitution of 1963. See generally, People v Bullock, 440 Mich 15, 28, 485 NW 2d 866 (1992); People v Sturgis, 427 Mich 392, 401, 397 NW 2d 783 (1986). For some inexplicable reason, this significant state jurisprudence was either over-looked or ignored by the appellate court.

4. Not only should this Court "defer" to these critical facets of state jurisprudence, Cummings v Evans, 161 F 3d 610, 617 (10th Cir 1998)(Citation omitted), it is "bound to accept" them, Missouri v Hunter, 459 US 359,

368, 103 S Ct 673, 74 L Ed 2d 535 (1983)(Citation omitted).

5. Admittedly, while "it is possible to commit CSC I without first having committed CSC II," People v Lemon, 454 Mich 234, 254, 562 NW 2d 447 (1997), such a recognition should not be dispositive for Blockburger consideration.

> Like the Court of Appeals in People v Garrow, Mich App 834, 839-840, 298 NW 2d 627 (1980), "[w]e recognize that in most cases, second-degree [CSC] is a factually included offense within first-degree [CSC], for sexual penetration is usually for a sexual purpose." Id at 254 n 29 (Emphasis added).

6. Given the factual presentation in this prosecution, the "distinction" Respondent attempts to portray, like the purported defense condemned by the Michigan Supreme Court in People v Lemon, supra, 454 Mich at 255, "is illogical...." By desiring "to criminalize successive stages of a single undertaking," United States v Gore, 154 F 3d 34, 46 (2d Cir 1998), the fanciful prosecutorial theories, like those discarded by the Supreme Court in Rutledge v United States, supra, 517 US at 297-304, cannot be deemed dispositive for Double Jeopardy Clause analysis, Id; United States v Gore, supra, 154 F 3d at 40-48.

7. Query why the prosecution deems it necessary to accord your Petitioner "credit for time served" even if in

fact, there are no valid double jeopardy issues at bar. In other words, if Michigan jurisprudence authorized separate prosecutions and convictions for a first and second-degree CSC emanating from a single event, as alleged by Respondent without citation[6], certainly there would be no "constitutional" necessity to accord "credit for time served," see, e g, Albernaz v United States, 450 US 333, 334, 101 S Ct 1137, 67 L Ed 2d 275 (1981); Whalen v United States, 445 US 684, 691-692, 100 S Ct 1432, 63 L Ed 2d 715 (1980). This internal inconsistency in the prosecution's argument is, we respectfully submit, indicative of its fallacy.

J.

In light of jeopardy having attached below due to the unexplained and constitutionally impermissible machinations of the prosecution, their appeal should have been dismissed. United States v Jorn, 400 US 470, 482-487, 91 S Ct 547, 27 L Ed 2d 543 (1971).

CONCLUSION

The Petition for writ of Certiorari should be granted.

Respectfully submitted,

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[6]. The absence—or inability to provide—authority for this theory speaks volumes as to its validity.

ARTHUR JAY WEISS (P 25225)
Attorney for Petitioner
30445 Northwestern Highway
Suite 200
Farmington Hills Michigan 48334-3175
(248) 855-5888

Dated: June____2001

Gerald Joseph PALAZZOLO,
Petitioner-Appellant,
v.
David G. GORCYCA, Oakland County Prosecutor, Respondent-Appellee.
No. 99-1862

6th Circuit
Court of Appeals
Filed 3/27/01
Leonard Green,
Clerk

United States Court of Appeals,
Sixth Circuit.
Argued: Oct. 31, 2000.
Decided and Filed: March 27, 2001.

State defendant petitioned for habeas corpus. The United States District Court for the Eastern District of Michigan, Paul D. Borman, denied the petition but issued a certificate of appealability. The Court of Appeals, Keith, Circuit Judge, held that where petitioner successfully moved to quash an information charging first-degree criminal sexual conduct (CSC I), and then pleaded nolo contendere to second-degree criminal sexual conduct (CSC II), defendant suffered no injury cognizable under the Double Jeopardy Clause when the state was permitted to appeal from the ruling of the trial court.

Affirmed.

1. Habeas Corpus 842, 846

Court of Appeals reviews de novo the legal conclusions involved in the district court's decision to deny habeas corpus, and reviews for clear error its findings of fact. 28 U.S.C.A. § 2254.

2. Habeas Corpus 769

Where the state court has failed to articulate its reasoning for its decision, federal habeas courts are obligated to conduct an independent review of the record and applicable law to determine whether the state court decision is contrary to federal law, unreasonably applies clearly established law, or is based on an unreasonable determination of the facts in light of the evidence presented; however, that independent review is not a full, de novo review, but remains deferential. 28 U.S.C.A. § 2254(d).

3. Double Jeopardy 5.1, 6

The Double Jeopardy Clause protects against a second prosecution for the same offense after conviction or acquittal, and against multiple. punishments for the same offense. U.S.C.A. Const. Amend. 5.

4. Double Jeopardy 107.1

The general double jeopardy prohibition against successive prosecutions does not prevent the government from retrying a defendant who succeeds in getting his first

conviction set aside, through direct appeal or collateral attack, because of some error in the proceedings leading to conviction. JJ.S.CA Const. Amend. 5.

5. Double Jeopardy 32

Where a defendant himself seeks to have his trial terminated without any submission to either judge or jury as to his guilt or innocence, an appeal by the government from his successful effort to do so does not offend the Double Jeopardy Clause. U.S.C.A. Const.Amend. 5.

6. Double Jeopardy 90, 167

Defendant suffered no injury cognizable under the Double Jeopardy Clause when the state was permitted to appeal from the ruling of the trial court reducing charge from first-degree criminal sexual conduct (CSC I) to second-degree criminal sexual conduct (CSC II), when defendant moved to quash on ground the corpus delicti of CSC I was not established by independent evidence prior to the admission of his confession at preliminary examination, and defendant then pleaded nolo contendere to CSC II; prosecutor's statements assuring defendant that he was not waiving any rights by proffering his plea to CSC II could not reasonably be interpreted to be assurances against prosecution on the CSC I charge if the state prevailed on appeal,and thus did not support contention that defendant

did not voluntarily choose to terminate prosecution on the CSC I charge. U.S.C.A. Const. Amend. 5.

7. Double Jeopardy 104, 167

Fact that jeopardy attached to charge of second-degree criminal sexual conduct (CSC II) when defendant was sentenced for that offense, after defendant successfully moved to quash an information charging first-degree criminal sexual conduct (CSC I), did not mean that the state was barred by Double Jeopardy Clause from prosecuting him on the CSC I charge following its successful appeal; the state did not seek to prosecute defendant on charges of CSC I and II in two separate, successive proceedings, the "second" prosecution was the direct and foreseeable result of defendant's motion to reduce the charge, CSC I and II are separate offenses under Michigan law, and the reduction of the charge and acceptance of defendant's plea to CSC II was not an implied acquittal on the greater charge. U.S.C.A. Const. Amend. 5; M.C.L.A. §§ 750.520b(l)(a), 750.520c(1)(a).

8. Double Jeopardy 135

Court determines whether two crimes constitute the same offense for double jeopardy purposes by application of the same-element test originally set forth in *Blockburger,* which inquires whether each offense contains an element not contained in the other; if not, they are the same offense

and double jeopardy bars additional punishment and successive prosecution. U.S.C.A. Const.Amend. 5.

9. Double Jeopardy 148

First-degree criminal sexual conduct (CSC I) and second-degree criminal sexual conduct (CSC II) under Michigan law are separate offenses for double jeopardy purposes since CSC I requires proof of penetration, while CSC II requires proof of an intent to seek sexual arousal or gratification, and neither element is common to both degrees. U.S.C.A. Const.Amend. 5;M.C.LA. §§ 750.520b(1)(a), 750.520c(1)(a).

Arthur Jay Weiss (argued and briefed), Law Offices of Arthur Jay Weiss & Associates, Farmington Hills, MI, for Appellant.

Marilyn Day (argued and briefed), Oakland County Prosecutor's Office, Pontiac, MI, for Appellee.

Before: KEITH, BOGGS, and COLE, Circuit Judges.

OPINION

KEITH, Circuit Judge.

Petitioner-Appellant Gerald Joseph Palazzolo ("Petitioner") was indicted in Michigan on a single charge of First-Degree Criminal Sexual Conduct ("CSC I"). The trial court granted Petitioner's motion to reduce the charge to Second-Degree Criminal Sexual Conduct ("CSC II"), and entered Petitioner's plea of *nolo contendere* over the state's objection. Thereafter, the state successfully appealed the trial court's order reducing the charge, and the Michigan Court of Appeals remanded for reinstatement of the CSC I charge. After exhausting state appeals, Petitioner sought relief, pursuant to 28 U.S.C. § 2254, in the district court below. He appeals from the judgment denying his petition for writ of habeas corpus, raising the single issue of whether the state's appeal and subsequent prosecution of Petitioner on the CSC I charge are barred by the Double Jeopardy Clause. For the reasons that follow, we affirm the judgment of the district court.

I. *BACKGROUND*

Petitioner was charged with CSC[1] in Oakland County Circuit Court, arising from the sexual assault of his adopted daughter. At the preliminary examination, his adopted daughter testified that Petitioner came into her room at night and touched her vagina, over her underwear, with his fingers. Her testimony did not indicate any penetration. Also at the preliminary examination, the state introduced Petitioner's confession, in which Petitioner admitted to digitally penetrating the victim and her sister on unspecified occasions.

Petitioner was bound over by the trial court on the charge of CSC I. Petitioner moved to quash the information or reduce the charge arguing that, under Michigan's *corpus delicti* rule, the state could not use a criminal defendant's confession until the state had introduced non-confession evidence sufficient to establish every element of the crime charged. He argued that his confession could not be used to establish probable cause to

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[1] Mich. Comp. Laws Ann. § 750.520b (West 2000). Section 750.520b provides, in pertinent part, as follows:

A person is guilty of criminal sexual conduct in the first degree if he or she engages in sexual penetration with another person and if ... [t]hat other person is under 13 years of age.

Mich. Comp. Laws Ann. § 750.520b(1)(a).

believe Petitioner committed CSC I, since penetration is an element of CSC I.

The state trial court first noted that the *corpus delicti* rule requires that the state introduce evidence of the "occurrence of a specific injury," but need not establish every element of the crime charged. The court concluded, however, that penetration is the "specific injury" of CSC I, and thus is part of the *corpus delicti* of CSC I. Consequently, the trial court held that the state could not use Petitioner's confession to establish the *corpus delicti* of CSC I, and granted Petitioner's motion to reduce the charge to CSC II.[2]

On June 16, 1997, Petitioner pled *nolo contendere* to CSC II. Prior to the plea, the state prosecutor notified the trial court and Petitioner that the state might appeal the trial court's reduction of the charge from CSC I to CSC II. This apparently took Petitioner's counsel by surprise. He stated that he was not aware that there might be an appeal,

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[2] Mich. Comp. Laws Ann. § 750.520c (West 2000). Section 750.520c provides, in pertinent part, as follows:

A person is guilty of criminal sexual conduct in the second degree if the person engages in sexual conduct with another person and if ... [t]hat other person is under 13 years of age.

Mich. Comp. Laws Ann. § 750.520c(1)(a).

and that he did not want his client to constructively consent to an appeal by entering a plea. In response, the state noted that it could take an appeal from the final judgment,[3] and did not feel that interlocutory appeal was appropriate. The state prosecutor stated that "[t]he [Petitioner] is not waiving any claims or rights by tendering a plea today." Petitioner's counsel stated that he would "take the Prosecutor's statement that we're not waiving anything by proceeding today[,] including double jeopardy." The trial court noted the state's objection, and ordered entry of Petitioner's *nolo contendere* plea.

On July 23, 1997, the trial court sentenced Petitioner to one year incarceration, three years probation, with the balance of jail sentence suspended after six months so that Petitioner could enter the electronic monitoring program. Again at the sentencing hearing, the state gave notice that

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[3] Michigan Comp. Laws Ann. § 770.12(2)(e) (West 2000) provides:

[T]he people of [Michigan] may take an appeal by leave in a criminal case, if the protection against double jeopardy under section 15 of article I of the state constitution of 1963 and amendment V of the constitution of the United States would not bar further proceedings against the defendant, from ... [a] final order or judgment based upon a defendant's plea of guilty or nolo contendere.

it might appeal the trial court's order reducing the charge, and noted its objection to the plea and sentence.

On September 8, 1997, the state filed a faulty claim of appeal, which was dismissed by the Michigan Court of Appeals.[4] On September 30, 1997, the state filed a delayed application for leave to appeal, which the Michigan Court of Appeals granted in an order dated December 10, 1997.

On review, the Michigan Court of Appeals held that the trial court erred in finding that Petitioner's confession was inadmissible, and in quashing the CSC I charge. The court noted that the purpose of the *corpus delicti* rule was to prevent a defendant's confession from being used to convict him of a crime that never occurred. The court noted that the victim's testimony at the preliminary examination was sufficient to establish a specific injury, and therefore Petitioner's confession could be admitted to elevate the crime to a higher degree.

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[4] Under Michigan law, the state can appeal from a final judgment based on a *nolo contendere* plea by application for leave to appeal. *See* Mich. Comp. Laws Ann. § 770.3(1)(e) (West 2000). Because the Michigan Court of Appeals lacked jurisdiction to hear the state's claim of appeal, *see* Mich. Ct.R. 7.203(A)(1)(b) (West 2000), that court dismissed.

Additionally, the appellate court rejected Petitioner's argument that the appeal should be dismissed because further prosecution would violate the Double Jeopardy Clauses of Art. I, § 15 of the Michigan Constitution of 1963, and the Fifth Amendment of the United States Constitution. Citing Michigan precedent, the court held that when a plea and sentence occur on a reduced charge, and the basis for the reduction is later overturned on appeal, jeopardy does not attach. The appellate court reversed the trial court, remanded the case, and reinstated the original charge of CSC I. The trial court subsequently vacated Petitioner's conviction and sentence on the CSC II charge.[5]

The Petitioner filed an application for leave to appeal in the Michigan Supreme Court, again alleging a double jeopardy violation. On May 25, 1999, that court denied Petitioner's application. Petitioner filed his petition for writ of habeas corpus on July 12, 1999, raising a claim of double jeopardy. On July 26, 1999, the district court

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[5] Under Michigan law, once a plea is vacated the prosecution may subsequently bring any charge that could have been brought prior to the plea. *See* Mich. Ct.R. 6.312 (West 2000) ("if a plea is withdrawn by the defendant or vacated by the trial court or an appellate court, the case may proceed to trial on any charges that had been brought or that could have brought against the defendant if the plea had not been entered.")

issued an order denying Petitioner's petition "for the reasons stated on the record." By the same order, the district court issued a Certificate of Appealability regarding the double jeopardy issue.

II. *STANDARD OF REVIEW*

[1] This Court reviews *de novo* the legal conclusions involved in the district court's decision to deny the writ under § 2254, and reviews for clear error its findings of fact. See Barker v. Yukins, 199 F.3d 867, 870 (6th Cir. 1999).

Because Petitioner filed his habeas petition after 1994, the Antiterrorism and Effective Death Penalty Act ("AEDPA") applies to this case. The AEDPA amended 28 U.S.C. §2254(d), which now provides, in relevant part:

> [An] application for writ of habeas corpus on behalf of a person in custody pursuant to the judgment of the state court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim:
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application

> of, clearly established Federal law, as determined by the Supreme Court of the United States.
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d) (West 1998).

The Supreme Court, in Williams v. Taylor, 529 U.S. 362, 120 S.Ct. 1495, 1498, 146 L.Ed 2d 389 (2000), clarified the distinction between a decision "contrary to," and an "unreasonable application of," clearly established Supreme Court law under § 2254(d)(1). A state court decision is "contrary to" Supreme Court precedent "if the state court arrives at a conclusion opposite to that reached by [the Supreme Court] on a question of law or if the state court decides a case differently than [the Supreme Court] has on a set of materially indistinguishable facts." *Id.* 120 S.Ct. at 1523. A state court decision "involves an unreasonable application of clearly established Federal law" only where "the state court's application of clearly established federal law was objectively unreasonable." *Id.* 120 S.Ct. at 1521. A federal habeas court may not find a state adjudication to be "unreasonable" "simply because that

court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly." *Id.* 120 S.Ct. at 1522. "Rather, that application must also be unreasonable." *Id.*

[2] Where the state court has failed to articulate its reasoning for its decision, "federal courts are obligated to conduct an independent review of the record and applicable law to determine whether the state court decision is contrary to federal law, unreasonably applies clearly established law, or is based on an unreasonable determination of the facts in light of the evidence presented." *Harris v. Stovall,* 212 F.3d 940, 943 (6th Cir. 2000) (citations omitted). "That independent review, however, is not a full, *de novo,* review of the claims, but remains deferential because the court cannot grant relief unless the state court's result is not in keeping with the strictures of the AEDPA." *Id.*

III. *DISCUSSION*

Petitioner argues that the appeal taken by the state to the Michigan Court of Appeals violated his right against double jeopardy as guaranteed by the Fifth Amendment of the United States Constitution. He contends that the Double Jeopardy Clause stands as an absolute bar to the state's

appeal from the final judgment of his conviction, and to the subsequent reinstatement of the CSC I charge.

[3] The Double Jeopardy Clause of the Fifth Amendment, made applicable to the states through the Fourteenth Amendment, *see Benton v. Maryland,* 395 U.S. 784, 794, 89 S.Ct. 2056, 23 L.Ed.2d 707(1969), provides that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb...." U.S. Const. amend. V. The Double Jeopardy Clause protects against a second prosecution for the same offense after conviction or acquittal, and against multiple punishments for the same offense. *See Ohio v.Johnson,* 467 U.S. 493, 498, 104 S.Ct. 2536, 81 L.Ed.2d 425 (1984); *North Carolina v. Pearce,* 395 U.S. 711, 717, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969).

[4, 5] The bar to retrial following acquittal or conviction ensures that the state does not "make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty." *United States v. Scott,* 437 U.S. 82, 87, 98 S.Ct. 2187, 57 L.Ed 2d 65(1978) (quoting *Green v. United States,* 355 U.S. 184, 187-88, 78 S.Ct. 221, 2 L.Ed.2d 199 (1957)). This bar is not absolute, however. It has long been settled that the

general prohibition against successive prosecutions does not prevent the government from retrying a defendant who succeeds in getting his first conviction set aside, through direct appeal or collateral attack, because of some error in the proceedings leading to conviction. See *Lockhart v. Nelson,* 488 U.S. 33, 38, 109 S.Ct.285, 102 L.Ed.2d 265 (1988). Moreover, where a defendant himself seeks to have his trial terminated without any submission to either judge or jury as to his guilt or innocence, an appeal by the government from his successful effort to do so does not offend the Double Jeopardy Clause. See *Johnson,* 467 U.S. at 501-02, 104 S.Ct. 2536.

In *United States v. Jenkins,* the Supreme Court held that a dismissal occurring at the stage of the proceeding after jeopardy had attached, but prior to the fact-finder's conclusion as to guilt or innocence, barred the state from appealing the dismissal, as the appeal would require further proceedings leading to a factual resolution of the issue of guilt or innocence. 420 U.S. 358, 369-70, 95 S.Ct. 1006, 43 L.Ed.2d 250 (1975). The Supreme Court quickly overturned *Jenkins* in *United States v. Scott,* holding that when a defendant takes an active role in the trial court's dismissal of the indictment, the Double Jeopardy Clause does not preclude the state from appealing the dismissal. 437 U.S. 82, 101, 98 S.Ct. 2187, 57 L.Ed 2d 65(1978).

The defendant in *Scott* was charged in federal district court on a three-count indictment. 437 U.S. at 84, 98 S.Ct. 2187. He successfully moved to have the first and second counts dismissed due to preindictment, delay, and was subsequently acquitted of the third count. *See id.* The government appealed the trial court's order granting dismissal of the two counts of the indictment to the Sixth Circuit Court of Appeals. *See id.* Relying on the Supreme Court's opinion in *Jenkins,* we dismissed the appeal, concluding that any further prosecution of the defendant on the two dismissed counts was barred by the Double Jeopardy Clause. See *United States v. Scott,* 544 F2d 903, 903 (6th Cir.1976). On appeal, the Supreme Court reversed, concluding that:

> the defendant, by deliberately choosing to seek termination of the proceedings against him on a basis unrelated to factual guilt or innocence of the offense of which he is accused, suffers no injury cognizable under the Double Jeopardy Clause if the Government is permitted to appeal from such a ruling of the trial court in favor of the defendant.... Rather, we conclude that the Double Jeopardy Clause, which guards against Governmental oppression, does not

> relieve a defendant from the consequences of his voluntary choice.

Scott, 437 U.S. at 99-100, 98 S. Ct. 2187. The Supreme Court noted that the defendant "was neither acquitted nor convicted, because he himself undertook to persuade the trial court not to submit the issue of guilt or innocence to the jury which had been empaneled to try him." *Id.* The Court concluded that the defendant "ha[d] not been 'deprived' of his valued right to go to the first jury; only the public ha[d] been deprived of its valued right to 'one complete opportunity to convict those who have violated its laws.'" *Id.* at 100, 98 S.Ct. 2187 (quoting *Arizona v. Washington,* 434 U.S. 497, 509, 98 S.Ct. 824, 54 L.Ed 2d 717 (1978)).

[6] Here, Petitioner moved to quash the information against him, asserting that the *corpus delicti* of CSC I was not established by independent evidence prior to the admission of his confession. Petitioner, like the defendant in *Scott,* voluntarily chose to terminate prosecution of the CSC I charge against him on a basis unrelated to factual guilt or innocence of the offense of which he was accused. Moreover, the state was quite willing to continue with its CSC I prosecution, but Petitioner chose to avoid trial. We believe that Supreme Court precedent makes clear that Petitioner, "by deliberately choosing to seek termination of

the proceedings against him on a basis unrelated to factual guilt or innocence of the offense of which he is accused, suffers no injury cognizable under the Double Jeopardy Clause if the [state] is permitted to appeal from such a ruling of the trial court in favor of [Petitioner]." *Scott,* 437 U.S. at 98-99, 98 S.Ct. 2187.

Particularly where, as here, the jury had not yet been empaneled and the proceedings had barely begun, the Double Jeopardy Clause is not offended by the government's appeal. The trial court dismissed the CSC I charge before jeopardy attached to that charge. It is well settled that "an accused must suffer jeopardy before he can suffer double jeopardy." *Serfass v. United States,* 420 U.S. 377, 393, 95 S.Ct. 1055, 43 L.Ed.2d 265 (1975).

Petitioner contends that the holding in *Scott* is inapplicable here, due to certain assurances made to him at his plea hearing by the state prosecutor. Petitioner contends, as he did both before the state courts and district court below, that he reasonably interpreted and relied on the prosecutor's statements, and that he would not have gone forward with his plea had he known that the result of the state's appeal could be the reinstatement of the CSC I charge. Petitioner asserts that, in light of the prosecutor's assurances, he did not "voluntarily choose" to terminate prosecution of him on the CSC I charge.

> At the plea hearing, the state prosecutor made the following remarks to the Petitioner and the state trial court: I don't know that there will or won't be [an appeal]. I told [the Petitioner's attorney] that I have, to review the case with my superiors. The [Petitioner], by tendering a plea, is not consenting to an appeal or anything. We still would have to seek leave to appeal in the Court of Appeals and it's at their discretion. I just wanted to state that on the record because I honestly don't know whether there will be one or won't but I thought that it would be proper to state that. I don't think it has any bearing on the [Petitioner]. The [Petitioner] is not waiving any claims or rights by tendering a plea today but I thought that he should know that it was a possibility.

Petitioner contends that he proffered his plea due to his assumption that the prosecutor was promising that he would be free from a second prosecution even if the state was successful in its appeal.

In response, the state contends that the prosecutor's statements simply conveyed that Petitioner was not giving

up any rights by pleading to the CSC II charge, including double jeopardy protections. The state argues that the prosecutor was not assuring Petitioner that he would have a meritorious double jeopardy argument, but rather that he was not waiving a double jeopardy defense. The state notes that, if Petitioner is correct that the prosecutor's statements promised Petitioner a meritorious double jeopardy defense in the event of an appeal, it would have made no sense for the prosecution to give notice of, or for that matter to attempt, such an appeal.

Clearly, by tendering his guilty plea, Petitioner was not waiving his right to be free from multiple prosecutions and cumulative punishment in violation of double jeopardy principles. However, we disagree with Petitioner's assertion that the prosecutor's statements granted him something more than this basic assurance. Rather, we believe that the prosecutor's statements can be interpreted only as an assurance that Petitioner was not waiving any rights by proffering his plea to CSC II. Petitioner did not waive a double jeopardy defense, and that is why he has been able to assert that defense before the state courts, the court below, and here on appeal. Moreover, the statements made by the prosecutor at the plea hearing could not reasonably be interpreted to be assurances against prosecution on the CSC I charge if the state won on appeal. The Petitioner was given notice that the state might appeal

the trial court's decision, and, in light of that notice, voluntarily chose to enter his plea to the reduced charge. The fact that Petitioner may have misinterpreted and unreasonably relied on the prosecutor's statements is largely irrelevant and distracting to the issue at hand.

[7] Next, Petitioner contends that, because double jeopardy attached to the CSC II charge when he was sentenced for that offense, the state is barred from prosecuting him on the CSC I charge. Petitioner relies for this proposition on *Brown v. Ohio,* 432 U.S. 161, 97 S.Ct. 2221, 53 L.Ed.2d 187 (1977). Petitioner's reliance, however, is misplaced.

In *Brown,* arising from his theft of an automobile, the state charged the defendant with joyriding, i.e., taking or operating a vehicle without the owner's consent. 432 U.S. at 162, 97 S.Ct. 2221. The defendant pleaded guilty, and was sentenced. *See Id.* Thereafter, the defendant was indicted on charges of auto theft and joyriding based on. the same theft. *See Id.* at 162-63, 97 S.Ct. 2221. The Supreme Court held that the second prosecution was barred by the Double Jeopardy Clause, since the defendant had previously been convicted of joyriding, which was a lesser included offense of auto theft. *See Id.* at 169, 97 S.Ct. 2221. The Court noted that the double jeopardy bar against successive prosecutions serves "a constitutional

policy of finality for the defendant's benefit," and protects the defendant from prosecutorial overreaching. *Id.* at 161-62,97 S.Ct. 2221 (quoting *United States v. Jorn,* 400 U.S. 470, 479, 91 S.Ct. 547, 27 L.Ed.2d 543 (1971)).

The facts presented in *Brown* are clearly and immediately distinguishable from those presented here. Unlike the situation in *Brown,* the state did not seek to prosecute Petitioner on charges of CSC I and II in two separate, successive proceedings. Rather, the state charged Petitioner with CSC I only, and, indeed, never filed an information charging CSC II. The Supreme Court's decision in Brown reflects the need to preserve the finality of judgments in criminal prosecutions and to protect the defendant from prosecutorial overreaching. The state's actions here, however, do not give rise to these concerns. The "second" prosecution of Petitioner was the direct and foreseeable result of Petitioner's motion to reduce the charge, and he cannot now "use the Double Jeopardy Clause as a sword to prevent the state from completing its prosecution" on the CSC I charge. *Ohio v. Johnson,* 467 U.S. 493, 502, 104 S.Ct. 2536, 81 L Ed.2d 425 (1984).

[8, 9] Moreover, the charges in *Brown,* were greater and lesser included offenses, and thus the "same offense" for double jeopardy purposes. This Court determines whether two crimes constitute the same offense for double

jeopardy purposes by application of the same-element test originally set forth in *Blockburger v. United States,* 284 U.S. 299, 304, 52 S.Ct. 180,76 L.Ed. 306 (1932). *See United States v. Dixon,* 509 U.S. 688, 696, 113 S.Ct. 2849,125 L. Ed.2d 556 (1993); *Murr v. United States,* 200 F.3d 895, 900 (6th Cir. 2000). This test "inquires whether each offense contains an element not contained in the other; if not, they are the same offense and double jeopardy bars additional punishment and successive prosecution." *Dixon,* 509 U.S. at 696, 113 S.Ct. 2849; *Blockburger,* 284 U.S. at 304, 52 S.Ct. 180.Under this test, CSC I and II are clearly separate offenses.[6] Therefore, Petitioner's conviction on the CSC II charge did not create a double jeopardy bar to

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[6] The crime of CSC I required proof of "sexual penetration." Mich. Comp. Laws Ann. § 750.520b(1) (West 2000). Sexual penetration can be for any purpose. *See* Mich. Comp. Laws Ann. § 750.520a(l) (West 2000); *Lemons,* 562 N.W.2d at 456. CSC II requires the prosecutor to prove "sexual contact." Mich. Comp. Laws Ann. § 750.520c(1) (West 2000); *Lemons,* 562 N.W.2d at 456. Sexual contact is defined as touching that "can reasonably be construed as being for the purpose of sexual arousal or gratification." Mich. Comp. Laws Ann. § 750.520a(k) (West 2000); *accord Lemons,* 562 N.W.2d at 456. Thus, CSC I and II are separate offenses since CSC I requires proof of penetration, while CSC II requires proof of an intent to seek sexual arousal or gratification, and neither element is common to both degrees. *Cf. Lemons,* 562 N.W.2d at 456.

reinstatement of the CSC I charge that was charged in the original indictment.

Further support for this conclusion is found in *Ohio v. Johnson,* in which the Supreme Court concluded that the Double Jeopardy Clause does not prohibit the state from prosecuting a defendant, who has pleaded guilty to some of the charges of an indictment, on the remaining charges. 467 U.S. 493, 501-02, 104 S. Ct. 2536, 81 L.Ed.2d 425 (1984). The defendant in *Johnson* was indicted on one count each of murder, involuntary manslaughter, aggravated robbery and grand theft. *See id.* at 495, 104 S. Ct. 2536. The defendant subsequently pleaded guilty, over the state's objection, to the involuntary man-slaughter and grand theft charges. *See id.* He then moved to dismiss the remaining charges, arguing that further prosecution on the two greater charges would violate his right against double jeopardy. *See Id.* The trial court granted the defendant's motion, and the Ohio Court of Appeals and Ohio Supreme Court affirmed. *See id.* The United States Supreme Court reversed, holding that the Double Jeopardy Clause did not bar the state from continuing its prosecution on the two greater charges. *See id.* at 502, 104 S. Ct. 2536.

The Court in *Johnson* first addressed the issue of successive prosecutions. The Court noted that the defendant was not "exposed to conviction" on the greater offenses,

"nor ha[d] the State had the opportunity to marshal its evidence and resources more than once or to hone its presentation of its case through a trial." *Id.* The Court observed that the case presented "none of the governmental over-reaching that double jeopardy is supposed to prevent," and concluded that "ending prosecution now would deny the [s]tate its right to one full and fair opportunity to convict those who have violated its laws."Id. at 502, 104 S.Ct. 2536 (citing Arizona v.Washington, 434 U.S. 497, 509, 98 S. Ct. 824, 54 L.Ed.2d 717 (1978)).

Secondly, the Supreme Court addressed the issue of multiple punishments. *Id.* at 499-500, 104 S. Ct. 2536. The Court concluded that the Double Jeopardy Clause's protection from multiple punishments for the same crime was not implicated by the state's prosecution of the defendant on remaining greater offenses after he had pleaded guilty to the lesser offenses. *See id.* The Court noted that, until the defendant was convicted of the greater offenses, he was not subjected to multiple punishments. *See id.* The Court observed that "the trial court, in the event of a guilty verdict on the more serious offenses, w[ould] have to confront the question of cumulative punishments as a matter of state law." *Id.*

The facts of the case before us are relatively indistinguishable from the situation presented in Johnson.[7] Here, as in *Johnson,* the state objected to the acceptance of Petitioner's plea, and at all times wished to proceed with the CSC I charge. Petitioner had notice that the state might appeal from the final judgment, yet he chose to go forward with his plea. The reduction of the charge and acceptance of Petitioner's plea to CSC II was not an "implied acquittal" on the greater charge, nor was Petitioner exposed to conviction on the greater charge. Moreover, the state has not had the "opportunity to marshal its evidence and resources more than once or hone [the] presentation of its case through a trial." *Johnson,* 467 U.S. at 501-02, 104 S. Ct. 2536. As noted by the *Johnson* Court, the state is entitled "to one full and fair opportunity to convict those who have violated its laws." *Id.* at 502, 104 S. Ct. 2536.

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[7] We reject Petitioner's contention that the principles articulated in *Johnson* are inapplicable because both CSC I and II were not charged in the information. On the facts presented here, that is a distinction without a difference. The state charged Petitioner with CSC I in the first information, and seeks to proceed with that charge. This is simply not a situation, as Petitioner contends, where the state is attempting to charge separate offenses in successive prosecutions based on the same conduct.

Similarly, Petitioner has not been subjected to multiple punishments. The trial court's reduction of the CSC I charge "did more than simply prevent the imposition of cumulative punishments; it halted completely the proceedings that ultimately would have led to a verdict of guilt or innocence" on the CSC I charge. *Johnson*, 467 U.S. at 499-500, 104 S. Ct. 2536. The jeopardy that attached to the CSC II charge does not bar the state from prosecuting Petitioner on the CSC I charge. Whether, in the event Petitioner is convicted of CSC I, he may be punished for the same conduct under both CSC I and II pursuant to state law is a matter we necessarily leave to the state courts to decide.

Accordingly, we conclude that neither the state's appeal nor its prosecution of Petitioner on the CSC I charge violate the Double Jeopardy Clause of the United States Constitution.

IV. *CONCLUSION*

For the foregoing reasons, the judgment of the Honorable Paul D. Borman of the United States District Court for the Eastern District of Michigan is **AFFIRMED.**

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

GERALD J. PALAZZOLO,
Plaintiff,

vs.

CASE NO. 99-73457
Hon. Paul D. Borman
U.S. District Judge

DAVID G. GORCYCA,
Oakland County Prosecutor
Defendant.

Eastern District
of Michigan
Filed 7/26/99

ORDER

(1) Denying Petition For Writ Of Habeas Corpus;
(2) Denying Motion For Stay Of State Proceedings;
and
(3) Granting Certificate Of Appealability

Before the Court is Petitioner Gerald J. Palazzo's request for a writ of habeas corpus. The Court heard oral argument on this petition on July 26, 1999. Upon consideration of the petition, the submissions of the parties, and the applicable law, the Court DENIES the request for a writ of habeas corpus for the reasons stated on the record.

After the Court issues its ruling, Petitioner requested that the Court stay the state proceedings and that the Court issue a certificate of appealability so that he may proceed to the Court of Appeals. For the reasons stated on the record, the Court will DENY Petitioner's request to stay the state proceedings. However, the Court will GRANT Petitioner's motion for a certificate of appealability.

Both 28 U.S.C. § 2253 (c)(1)(A) and Federal Rule of Appellate Procedure 22(b) state that an appeal from the district court's denial of a writ of habeas corpus may not be taken unless a certificate of appealability (COA) is issued either by a circuit court or district court judge. A district court judge has the authority to issue a certificate of appealability under the Antiterrorism and Effective Death Penalty Act. *Lyons v. Ohio Adult Parole Authority*, 105 F. 3d 1063, 1073 (6th Cir. 1997); *cert. den.* 520 U.S. 1224 (1997). If an appeal is taken by an applicant for a writ of habeas corpus, the district court judge shall either issue a certificate of appealability or state the reasons why a certificate of appealability shall not issue. F.R.A.P. 22(b). A district court is to set forth in its order all of the issues that the petitioner raised in the habeas action and identify those issues, if any, that the district court is certifying for appeal. *In Re Certificates of Appealability*, 106 F.3d 1306, 1307 (6th Cir. 1997).

In order to obtain a certificate of appealability, a prisoner must make a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2); *Lyons v. Ohio Adult Parole Authority,* 105 F.3d at 1073. To demonstrate this denial, the applicant is required to show that the issues raised are debatable among jurists of reason, that a court could resolve the issues in a different manner, or that the questions are adequate to deserve encouragement to proceed further. *Trevino v. Johnson,* 168 F.3d 173, 177 (5th Cir. 1999); *Tokar v. Bowersox,* 1 F. Supp.2d 986, 1016 (E.D.Mo. 1998).

In this case, the Court finds that issue of double jeopardy raised by Petitioner may be debatable among reasonable jurists. Therefore the Court will **GRANT** the Certificate of Appealability.

SO ORDERED.

Dated: 7/26/99

/s/ Paul D. Borman
HON. PAUL D. Borman
U. S. DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

GERALD J. PALAZZOLO,
Plaintiff,

vs.

CASE NO. 99-73457
Judgement in a Civil Case
Hon. Paul D. Borman
U.S. District Judge

DAVID G. GORCYCA,
Oakland County Prosecutor
Defendant.

Decision by Court. This action came the Court at a hearing on Petitioner's Writ For Habeas Corpus. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED, that Petition For Writ of Habeas Corpus is **DENIED,** Motion for Stay of State Proceedings is **DENIED** and Certificate of Appealability is **GRANTED.** Judgment is entered for the Respon-

dent, David G. Gorcyca and against the Petitioner Gerald J. Palazzolo.

7/26/99
Date

/s/ David J. Weaver
Clerk

/s/ Jonie Parper
(By) Deputy Clerk

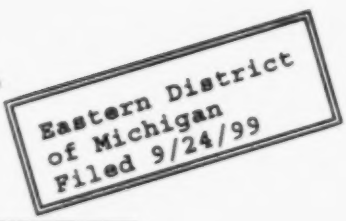
CC: Arthur J. Weiss, Marilyn Day

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

GERALD J. PALAZZOLO,
Plaintiff,

CASE NO. 99-73437
vs. **Detroit, MI**
July 26, 1999

DAVID G. GORCYCA,
Oakland County Prosecutor,
Defendant.



TRANSCRIPT OF MOTION

BEFORE THE HON. PAUL D. BORMAN
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Petitioner: ARTHUR JAY WEISS, ESQ.
For the Respondent: MARILYN J. DAY, ESQ.

Court Reporter: Ronald A. DiBartolomeo, CSR
740 U.S. Courthouse
Detroit, Michigan 48226
(313) 962-1234

TABLE OF CONTENTS

WITNESS: Page

Motion 3

EXHIBITS:

Identification	Offered	Received

N 0 N E

Detroit, Michigan
Monday, July 26, 1999

* * *

THE CLERK: Palazzolo versus Gorcyca 99-73457.

THE COURT: Would the parties please identify themselves for the record beginning with the petitioner?

MR. WISE: Andrew Wise on behalf of the petitioner.

MS. DAY: Marilyn Day, assistant prosecuting attorney for David Gorcyca, Oakland County Prosecutor.

THE COURT: Thank you.

Let me ask Ms. Day, have you received a copy of the reply that was filed?

MS. DAY: I was hand delivered a copy this morning.

THE COURT: Have you had chance to read it?

MS. DAY: Yes.

THE COURT: Reply is eight pages. Rule is five pages. I read it, but let's follow the rules for now on

You are the petitioner. Please proceed, Mr. Wise.

MR. WISE: Good morning, your Honor.

THE COURT: Good morning.

MR. WISE: Your Honor, the factual background which causes us here to be here this morning --

THE COURT: Let me -- I know the background. I

read everything and got all the books. Let me ask a question, and I will let you get into the argument. They cite the *Howard* case. You say that the *Howard* case violates federal precedent. The *Howard* case is pretty much on point in terms of factual situation. Your client, before he pled guilty, was told by the prosecutor, we may appeal from the judge's -- Judge Grant's ruling, and your client went ahead and pled.

MR. WISE: Only after the prosecutor assured my client and myself, you were not giving up your rights.

THE COURT: Not talking about getting in here. Let's say you are here. You didn't give up the right to argue the double jeopardy issue, what is the double jeopardy issue, and have I framed it right. The facts are that your client at the time of the plea was told by the prosecutor before the plea, we may appeal the judge's ruling taking it down from CSC 1 to CSC 2.

MR. WISE: If we proceeded, without any promise or assurance from the prosecutor, then I would not be here today.

THE COURT: What was the promise that they made?

MR. WISE: Not waiving or consenting to anything. In fact, the prosecutor went so far to say, I don't think it has any bearing on the defendant. The defendant is not waiving any claims.

THE COURT: Let's start with Page 4:

"Your Honor, may the record reflect," and then going down to the fourth paragraph:

"I am not certain that our office will appeal that ruling," Judge Grant's ruling. "I will only state for the record so that the defendant knows it is possible that we may."

Am I reading that right?

MR. WISE: You read correctly those four lines.

THE COURT: What is it that you say changes that position of the prosecutor because you say well, I am sandbagged? I didn't know.

MR WISE: If the Court would reflect, please look at Page 5, Line 11.

THE COURT: Okay.

MR. WISE; "I don't want to by proceeding today, somehow consent either overtly or covertly to the prosecutor's machinations that at some point in the future they are going to appeal this.

Quite frankly, I am taken by surprise that it's now come to light right on the eve of when we are going to proffer a plea here.

We had a discussion in chambers. To the best of my knowledge it was not raised then. I did ask Ms. Stiel, when the Court initially rendered its ruling, whether or not there would be an appeal and got nothing.

Now if this is simply a matter of protecting the record, that's one thing. If it's simply a matter of that there

is going to be some type of interlocutory appeal, then I think that we have to be aware of it so we are not sandbagged."

In other words, I had no intention of going forward with the plea.

THE COURT: Then she said: "Your Honor, there's no attempt to sandbag." You get 42 days. The prosecutor gets 42 days from the filing of a claim of appeal until the judgment sentence is entered.

MR. WISE: Look at Line 21 at Page 6. It says: "I don't think it has any bearing on the defendant."

How can the appeal that's going from the 15 year felony to a life maximum felony not have any bearing on the defendant? That seems the case law, specially federal case law, suggests concern when the defendant consents to something or waives something by going forward in the light of what they are being told.

"The defendant is not waiving any claims or rights by tendering a plea today," and I indicate on the top of next page:

"I will take the prosecutor's statement that we are not waiving anything by proceeding today and including double jeopardy."

Now I don't think there is any question but that when Mr. Palazzolo proffered his plea which was accepted by the court and was sentenced. Jeopardy attached.

THE COURT: Let's go to the law then. Give me

some law.

MR. WISE: The law that's cited in the original a split of authority. Some courts take the position that when the plea was accepted --

THE COURT: Let's say jeopardy attached, either way, person pled or sentenced.

MR. WISE: He was sentenced July 23, 1997. Jeopardy attaches. Now there has to be something if the state prosecution can go forward that initiates that attachment of jeopardy and --

THE COURT: Was he ever in jeopardy when he pled on the CSC 1 charge?

MR. WISE: CSC 2.

THE COURT: Right.

MR. WISE: That's correct.

THE COURT: Judge had ruled that CSC 1 was not appropriate for that case.

MR. WISE: That's correct. CSC 2 is part of the same statutory scheme as CSC 1. These are not two diversed, separate, distinct statutes, but sections of the same scheme. You cannot under Michigan law charge Mr. Palazzolo for this single incident as both a CSC 1 and CSC 2. The legislative's intent is clear. The case law is clear. One event, one conviction. This is not as though you got two different statutes and you could have two separate convictions. So when the CSC 2 jeopardy is attached, it precludes the CSC 1.

THE COURT: Even though it is attached over the prosecutor's objections to the reduction of the charge?

MR. WISE: No, because I didn't nor did my client consent or waive. If we would have --

THE COURT: You didn't waive your right to raise the double jeopardy argument after the plea. That's clear. You're free, and we are here because -- and also you raised it before the Michigan Court of Appeals which dealt with the double jeopardy argument, cited the Howard case, but mentioned double jeopardy, the court of appeals.

MR. WISE: Yes.

THE COURT: Michigan Supreme Court denied leave. You have been able -- and the prosecutor has not come in and said -- they have here part of the brief, you don't belong, but in another part they talk about the double jeopardy issue as well.

MR. WISE: Your Honor, in all due respect, the Court's question underlying the basis is somewhat troubling. If you take the position that Mr. Palazzolo, in the face of prosecutorial indication, they may do something, either waive or consent it, then it turns on its head, what the prosecutor said, if you say I can raise the issue, but effectively I waive the issue by proceeding, there seems to be --

THE COURT: You don't waive the issue. You have not waived it. The question is whether there is a valid double jeopardy. I didn't say that you waived the issue.

The Michigan Court of Appeals did not say that you waived the issue, Michigan Court of Appeals dealt with the double jeopardy. We are past that. You did not waive the issue. Michigan Court of Appeals dealt with it. I am ready to deal with it, what is the law and tying the facts to the law on the double jeopardy.

Your point is when he pled to CSC 2 and was sentenced, that jeopardy attached, and therefore, they cannot come back, and after got reversed, and say we will try him on the more serious charge like Green versus the United States.

MR. WISE: If you look at the case law, both state and federal, predominantly federal, talks about plea by conviction, guilty plea or no contest plea. If the prosecutor puts something on the record to indicate there maybe post-conviction proceedings, and the defendant proceeds in the face of that, the published opinion indicates the defendant consented to it, or waived it, and therefore, there is the unattachment of jeopardy.

Here there was a judicial admission, not consenting or waiving. It was a halo position if raised the issue, but effectively waive or consent to it on merits, and this is a judicial admission, which is conclusive. It is almost like a plea bargain, like a Rule 11 plea bargain, and to say that the defendant is guaranteed something, and then on appeal saying well, you may have been guaranteed procedurally --

THE COURT: Isn't it comparable to a Rule 11 plea

bargain where it says the prosecutor -- that you can waive, you can make certain arguments, the prosecutor can make certain arguments at sentence, the prosecutor reserves the right to make an argument and you reserve?

MR. WISE: Yes, the ability to make the argument, but rule on it substantively because of what you have done, relying upon the unequivocal promises and assurances of the prosecutor.

THE COURT: Which is that.

MR. WISE: I was not waiving or consenting to anything.

THE COURT: Right. If you have, based on the facts of the proceeding --

MR. WISE: Therefore, the cases that say that the defendant implicitly waives the double jeopardy concern or consents to reprosecution by going forward in the face of the prosecutor admonition, rings this halo.

THE COURT: Wait. I think that may be two ships passing in the night.

MR. WISE: It is not ships passing in the night. She is in open court with Judge Grant sitting where you are, represented in open court to the court, to my client and myself, proceed and nothing is waived. Nothing is consented. She says it doesn't have any affect. To say ships in the night is specious. It is like the Assistant U.S. Attorney saying my client can do something or not do something, and simply say, well, it is like two ships in the

night. You were talking cross purposes. I specifically raised double jeopardy. She specifically said I was not waiving it, and the law is clear either at the plea acceptance or sentence jeopardy attaches, and there is nothing that unattaches that jeopardy.

THE COURT: I will hear your argument.

MR. WISE: As I indicated to the Court's clerk, and I apology, the reason it was late, very late, I was out of town Thursday. I didn't have any power. The earliest I could get to it was Sunday.

THE COURT: I understand. I left at five.

MR. WISE: I apologize, but there is one case dealing that I had citation for and --

THE COURT: I got it.

MR. WISE: Rashad, 108 Fed 3rd.

THE COURT: It came out of this Court and affirmed by the 6th Circuit.

MR. WISE: Rashad versus Burt, 108 Fed 3rd 677.

Does the court have any additional questions.

THE COURT: Not right now. I will.

MS. DAY: Good morning, your Honor. My initial argument as I set forth in the brief, petitioner is not properly before this Court. I will bypass that argument and get into the merits.

This is a habeas petition. Therefore, the only thing this Court can decide is whether defendant was violated of double jeopardy under the Fifth Amendment. You know

what the standard of review is. The state court decisions is in clear contravention of U.S. Supreme Court decision. The defendant was unable to address even one case, Supreme Court decision to the Michigan court to the contrary. This case is clear on *Blockberger v. United States, U.S. v. Dixon* for multiple prosecution for the same offense, looking at the same element test under federal law, and not talking about Michigan law. That is no concern to you.

THE COURT: It is, and I read the *Howard* case, what the Michigan Court of Appeals cited in this case, and *Howard* and *Vasquez* cases, both of those. I read those, and -- but nevertheless, if it violates federal law double jeopardy, clear violation of federal law, then we go to the federal cases, and I am glad to see in the reply -- at least we got the facts of *Grady v. Corbin.* That was done, and we get to the question of what federal Supreme Court or 6th Circuit decision is this conduct violating.

MS. DAY: Under *Blockberger and Dixon.* CSC 1 and 2 is different. First degree you have to show penetration. Second degree is for sexual purpose. There is no sexual purpose for CSC 1. Under federal law you can prosecute for first degree CSC. This is clear in the federal case that I cited to you, which is very similar facts dealing with the first and second degree CSC, *Grave v. Lewis,* where the Court indicated when the defendant or petitioner was acquitted of first degree CSC, there is no double

jeopardy to try second degree. Defendant cites --

THE COURT: One thing you don't have, which you have lot of double jeopardy precedence is the trial.

MS. DAY: Correct.

THE COURT: Or *People v. Anderson,* which was the Michigan Supreme Court decision, where in the middle of the trial the judge said, I heard enough. Court of appeals reversed it, and the Supreme Court unanimously said double jeopardy. It was during a trial. We don't have that here. It is not a trial or where factual matters brought out during jeopardy proceedings.

You do admit there is jeopardy after sentence?

MS. DAY: I admit to that, but looking at the state decision, you see why the courts are not playing jeopardy. In this case the defendant was always charged with first degree CSC. This is not *Brown v. Ohio* where the defendant is charged with a lesser offense, and after he pleads guilty and is sentenced, the prosecutor went back and charged him with the higher offense. He was always charged with first degree CSC. What happened --

THE COURT: I notice also when he pled guilty, the prosecutor had not even filed an information for CSC 2. Judge Grant notes that in the plea, the prosecutor has not filed an information charging CSC 2.

MS. DAY: That's correct.

THE COURT: At the time he pled, the charge that the prosecutor has submitted was CSC 1. Judge Grant ruled

it to be CSC 2. Judge Grant took the plea at the time when the information from the prosecution's charging paper said CSC 1.

MS. DAY: That's correct.

THE COURT: And at the time the prosecutor in the courtroom said we may appeal, but we are not taking away the defendant's rights. If they want to appeal the double jeopardy --

MS. DAY: The defendant placed a plea on the record saying I am not waiving search and seizure. The prosecutor was not saying you -- you don't have a right. If you do have a double jeopardy claim, you can take it up. She was saying, like you argue, you are not waiving the right to raise this issue. That's all she was saying. If you read the context, it would not make sense to put the defendant on notice we may appeal, and by the way, you are right, This is double jeopardy, and cannot do anything about it. Why would he file an appeal. Under state law, we clearly agree with *Howard* and *Siebert* and all other cases. We have the authority to file the appeal from the judgment of sentence, and that's what he did in this case. The prosecutor did nothing wrong in this case.

THE COURT: Were they waiting to see the sentence?

MS. DAY: It is possible. I don't know why they chose not to file an interlocutory. It takes a long time to get through the system in our office to determine if there

will be an appeal. The assistant prosecutor has to get permission from her supervisor. It takes a long time to determine whether an appeal will be had within the 21 days. I don't know if she had been able to do so, but I think because every case law is clear and *Howard*, an Oakland County case, we knew that there was no double jeopardy problem if we waited until sentence. We waited to see what the sentence would be before we appealed. There was no overreaching as you find in the other cases. As you recognized, he was always charged with first degree CSC. That's what we intended to charge. Never been able to muster the charges with the defendant to plead to an lesser offense. We objected to a reduction, objected to no contest, put the defendant on notice at the plea and sentence that we might be appealing, and under federal law this is clear; that the United States Supreme Court has said there is no violation of multiple prosecution in a case. The crimes are separate, distinct and separate elements.

THE COURT: Even if they don't contain separate elements, I think that is not as clear. The question is, did jeopardy attach in U.S. Supreme Court would say the prosecution cannot appeal from the conviction, and in *U.S. v. Scott*, the Supreme Court said, no interest protected by the double jeopardy clause is invaded when you appeal mid-trial proceedings, and the matter is favorable to the defendant, and I guess *Lockhart v. Nelson* has similar language.

What I am trying to understand -- and then you also have *Green* case, *Green v. United States*, and that dealt more with a trial than what we have in this case. Your argument is that under federal law what?

MS. DAY: There is no double jeopardy problem. If you look at *Ohio v. Johnson*, which was a case during which the defendant was charged with four different offenses, the court allowed the defendant to plead to the lesser offenses. He pled to the lesser offenses, and the trial court dismissed the greater offenses. He dismissed double jeopardy. That went to the United States Supreme Court, and the court said there was no violation of double jeopardy.

In this case, even though the defendant pled, the prosecution could appeal the dismissal of the greater charges and there is no double jeopardy problems, and we cited that in the brief, 467 U.S. 493, 1984 case. In that case it said the defendant was never exposed to conviction to the charges reduced. Our case, no double jeopardy is attached to CSC. In the *Johnson* case, the prosecutor never had the opportunity to marshal evidence against a crime. In the *Johnson* case the court said, the defendant was not exposed to conviction on the charges which he pled not guilty to or to the greater offenses. The court specifically said the defendant was not exposed to conviction on those charges. Therefore, there is no double jeopardy. That case is most similar to what we have here. It was a plea to a

reduced charge.

THE COURT: All right. Okay. Let me hear from Mr. Wise.

MR. WISE: Your Honor, with all due respect, jeopardy is jeopardy, whether it comes as a result of a jury verdict or a plea based conviction. Once jeopardy attaches, it has to be dealt with. *Brown v. Ohio* is very clear. *Ohio v. Johnson* is significantly different because those pleas did not effectively terminate the prosecution in the judge's point of view because the Court dismissed it over the prosecutor's objection.

In this case Mr. Palazzolo tendered a no contest plea, which effectively concluded the prosecution -- and with all due respect in terms of the Court's colloquy with the prosecutor about that information had not been filed -- once the charges are reduced pursuant to an order of the Court, I'm not so sure a new amended information has to be filed. Anything subsequent to that is valid. My client --

THE COURT: If indicates again that the prosecutor was not proceeding or admitting or going along with the scheme that you think they were going.

MR. WISE: What it shows is less than a diligent assistant prosecutor. There are cases when the prosecutor's office in the middle of the criminal case, after the court has made an evidentiary ruling, filed that night an interlocutory appeal, and nothing regarding the reasons for explaining the

delay.

The Court with all due respect did not make a record. That does not exist, and Ms. Day cannot make a record that did not exist, and what she indicated was that the prosecutor didn't even refer it to the appellate section until way after the proceedings, and in terms of waiting for the sentence is spurious because the prosecutor knew. She stipulated what the guideline range would be, and the Court indicated what it was going to do, in all likelihood would go long before we showed up for the plea or sentencing.

So you can't make it up after the fact to make it look good. They dropped the ball, I would not be here today -- this Court would not have to make a decision after Judge Grant rendered a decision in early May if they filed an interlocutory appeal. They sat on their hands for no good reason. They were lazy or didn't care, and it had nothing to do with the outcome of sentencing. They never articulated in any court, and even Ms. Day articulated, and in writing, had we submitted to the Michigan Supreme Court. They didn't send me the case to way after sentencing, not about we want to say what the sentence would look like, and it is interesting to note -- and the Court can take judicial notice -- in Michigan, if the sentence is disproportionate or not within the guidelines, the prosecutor can take an appeal. They never raised that in their appeal. All they raised was the propriety of the judge's sentence on *corpus delicti.* They simply sat back

and said, maybe justice will be done because he will get x number of years. They could have raised that. There is nothing that precludes the appellate body to consider more than one issue. They could raise *corpus delicti* and disparity or inappropriateness. They didn't do it because it did not exist, and they are overreaching.

Their delay is why we are here, and there is no reason for it, and the Court asked me a little while ago about the Howard case. The significant crucial difference in Howard is that the prosecutor did not promise the Court and the defendant and the defense counsel before the proffer of the plea; that whatever the prosecutor did would not affect the defendant, and the defendant was not waiving or consenting to anything, and there has to be something except as to a couple of filings to vitiate jeopardy, and there is no question, when they filed for appellate request, jeopardy had attached.

If the case is going to proceed, then there has to be a vitiation of that attachment, and there is no case that I have been able to find, there is no case that the prosecutor cites that shows that this type of situation where the defendant is assured that no argument of explicit or implicit consent or waiver will be advocated against a double jeopardy claim, and the only time that the cases that I have been able to find that says this occurs is because there is some waiver of consent on the part of the defendant. Then jeopardy cannot be effectively removed and vitiated in this

matter.

As a last matter, if the Court is incline to deny the petition, two things: One, I ask that the state matter be stayed to go to the 6th Circuit because as the case law indicates in the brief, it's a halo remedy for Fifth Amendment. I think the United States Supreme Court decision on any case in the federal system is that defendant is not entitled to interlocutory appeal on the basis of denial of pre-trial motion except when it comes to double jeopardy guarantees a double jeopardy claim to be litigated before the accuse goes forward in trial, and also, I believe under current law, the Court has to issue a certificate of probable cause, and I submit how the court rules are laid out, there is probable cause to believe we presented a claim.

THE COURT: Let's me ask you a question. Do you know when Judge Grant intends to proceed to trial in this case?

MR. WISE: If the Court denies it, I am suppose to leave from here and go to Oakland County Circuit Court, and I assume, unless they have started something today or a carryover from Friday, we will start picking a jury on Mr. Palazzolo's matter.

THE COURT: Ms. Day, any information on that?

MS. DAY: No, your Honor.

THE COURT: Okay. The Court has before it a petition for a writ of habeas corpus. The facts are that the defendant was charged in a state court with Criminal Sexual

Conduct 1, CSC 1; that he moved to have -- after the examination or where he was bound over on CSC 1, he moved before the circuit judge to have it dropped down to CSC 2 on the ground that his confession cannot be used on the basis for raising the charge to CSC 1. Judge Grant did grant the motion to reduce it CSC 2. Thereafter, the defendant went to plead to the CSC 2 charge.

At the time of plea, the Court -- before taking the plea, the court, Judge Grant, said to the prosecutor on Page 8 of the transcript, Line 12: Do you have a new information, and the prosecutor says, no, we have not filed, and then the Court says, CSC 2? That's correct, meaning it did not file.

So at the time of the plea, the prosecutor is still proceeding from their point of view, their preference of what they charged, CSC 1. The prosecutor did object to the no contest plea, but also more importantly on Page 4, the prosecutor notes that Judge Grant had granted the defendant's motion to reduce the charge to CSC 2, and the prosecutor said, I am not certain we will appeal. I state for the record the defendant knows it is possible that we may. Defense counsel was taken by surprise by that, but nevertheless the client went ahead with that.

The fact that the prosecutor states, you know, we are not trying to sandbag. We have 42 days for filing a claim for appeal from the judgment of sentence. So we can do it that way. We don't have to do an interlocutory appeal,

and defendant is not waiving any claims or rights. They can raise a valid double jeopardy issue, and so this is why it was raised before the Michigan Court of Appeals, and is proceeding here.

The Michigan Courts of Appeals did deal with the double jeopardy issue. The Michigan Court of Appeals rejected it citing the case of *People v. Howard* 212 Michigan Appeals 366, 1995 case which in pertinent part on Page 370 says:

"When a plea and sentencing occur on a reduced charge and the basis for the reduction is later overturned on appeal, jeopardy does not attach."

So the issue then comes here whether the federal precedent, Supreme Court or otherwise provides that the Michigan court properly interpreted the federal constitutional precedent, and I find that they have not. I think that this is not a case where there was a trial and a determination in *Ohio v. Johnson,* 140 Supreme Court 2536 1984, where the person entered a guilty plea over the state's objection to lesser charges, and then the prosecutor proceeded on the more serious one, and also more importantly, the Supreme Court precedent in *U.S. v. Scott,* which is 98 Supreme Court 2187, 1978 case, this was even, indeed, during a trial, no interest protected by the double jeopardy clause is invaded when the government is allowed to appeal and seek reversal of such mid-trial termination of the proceedings in a manner favorable to the defendant, but

Scott -- I would not really base it on Scott. We can go ahead with *Lockhart v. Nelson,* 109 Supreme Court 285, 1988 where they permitted a retrial where the trial court erred in admitting evidence, and without it there was insufficient evidence to support judgment and conviction, but with that evidence, there was enough, and say permitting retrial.

In this instance, it is not the sort of governmental impression which double jeopardy clauses are aimed. Rather it serves the interest of the defendant allowing you to have a fair trial, free of error. Here we are not dealing with a trial, and that's why *Green v. United States* does not apply. That was a 78 Supreme Court 221, 1957 case, because acceptance of the guilty plea to a lesser charge does not constitute inferential not guilty to a higher charge, but in this situation, indeed -- you know, in the Johnson case they pled to a lesser included, and allowed the prosecution to proceed on the -- on the higher charge. I think here clearly the prosecutor did not agree tot he plea on the lesser charge. The prosecutor opposed the Judge's reduction to a lesser charge. Therefore, jeopardy, while there was a conviction and sentence from the federal precedential point of view, it does not protect the defendant against when the court of appeal finds the judge's ruling was wrong. The defendant at the time he plead knew it was going to be appealed. It does riot prevent the government -- state from prosecuting the defendant on the CSC 1 charge, and that is

ruling of the Court. The Court will deny petitioner's request of the granting of habeas corpus.

With regard to the two issues that the Court was apprised of at the end, and I guess -- let me first ask the prosecutor and get the facts, do you have a position on either issue, one in terms of a stay, and second, in terms of -- well, the certificate of probable cause is something for the Court to determine that one. You don't have to respond to that, but the issue with --

MS. DAY: Yes, your Honor. I object to any stay being issued. The case law is clear. The defendant does not have a valid claim under federal law. The defendant is delaying this trial, and I strenuously object to a stay.

THE COURT: Do you know when the case is set to go? I know it had been set for this morning, and I appreciate the fact that I was allowed to work yesterday to prepare for the argument. I didn't have a chance on Thursday and Friday. Perhaps -- there is a phone in the conference room. Maybe the two of you could push the speaker key, and I would just like to know when the trial is set to go, and then I will speak further to that. If you want to go, you and Mr. Wise, go behind the room that says "Jury Room." There is a conference room. Push the speaker button, then 8, then the number for Judge Grant's number, and we can get a heads up. That will be helpful, and we will come back.

MS. DAY: Thank you.

(Recess taken.)

(Proceedings resumed.)

THE COURT: Okay. What information can either of you provide, if any, relating to what Judge Grant will be doing with this case?

MS. DAY: I don't have much information other than she is voir diring on another case. We asked if the case will go today, and we were told probably not, but said we need to call in the afternoon. Both clerks are in the courtroom, and they can give us a more definite time.

THE COURT: So do they pick juries in the afternoon?

MR. WISE: Some have done it. The issue becomes whether if she completes jury voir dire.

THE COURT: Once voir dire is completed, they don't go in the trial?

MR. WISE: I assume it is a trial. The clerk cannot indicate how long the matter would last, and whether or not she wanted to do Palazzolo immediately.

THE COURT: Let me get a read on this.

The petition in this case was filed July 12th, right?

MR. WISE: Yes.

THE COURT: What was the date that the Michigan Supreme Court denied leave to appeal because I know the Michigan Court of Appeals ruled?

MR. WISE: May 25th. So the record is clear, after the Michigan Supreme Court denied leave, I contacted Mary Mara, who was Mary Stiel, assistant prosecutor, to acquire what the office -- prosecutor's office would want. It took a while to get back to me to indicate that. We tried to set an appointment with Judge Grant to ascertain what the court's feelings were in light of the Supreme Court denial, and it was not until Thursday morning before the 12th that we met with Judge Grant, and I was told what her feelings were, and that weekend Thursday, Friday -- well, Thursday, Friday, Saturday, Sunday, I prepared and researched.

MS. DAY: I don't have any independent knowledge. I know it was set for trial six weeks before he filed the petition.

MR. WISE: It was set by a computer spitting --

THE COURT: What date?

MR. WISE: The 19th.

THE COURT: Of --

MR. WISE: July.

THE COURT: Set for trial July 19th, and that was filed six weeks.

MS. DAY: Approximately six weeks after the Supreme Court.

MR. WISE: Judge, maybe it will work this way. It is 21 days from May 25, 1999, which takes you to mid-June. I would say the latter part of June, and again, I reemphasize the fact that I first wanted to know what the

prosecutor's position.

THE COURT: The prosecutor's position is that they appealed. They were going on the CSC 1.

MR. WISE: Judge, we could have taken the position that since my client was sentenced and had no objection to the sentence at the time that --

THE COURT: I think there was on the record. The sentence, wasn't the range like two years to something, and he got one year with six months --

MR. WISE: If my recollection is correct, the prosecutor originally stipulated or did not agree that the range would be zero to 36.

THE COURT: Right.

MR. WISE: Beyond that, right. Now I don't recall the specifics, but in any event, nobody wanted to bring the young kids into court for trial. We are talking about the same sentence. Then Ms. Mara indicated with me, talk to the judge and see what her feelings are, and we could not get to see her until the Thursday before I filed.

THE COURT: Basically I read the briefs in this case. I read the law. It seems clear to me, obviously one person's opinion is that the prosecutor did clearly say, were serve the right to appeal. They appealed. There was no trial. There was no jeopardy situation, and so the Michigan Supreme Court ruled on May 25th. The petition did not get here until July 12th. I don't see a basis for staying the prosecution at this time, and so I will deny the motion for

stay, and that's the ruling of the Court.

MR. WISE: What about the certificate of probable cause?

THE COURT: Well, what provision does that -- Mr. Besser is here, and the reason he is here is because he knows what provision that comes under.

MR. BESSER: Should I address the record?

THE COURT: What is the provision?

MR. BESSER: 28 U.S.C. 2253.

THE COURT: Thank you.

MR. BESSER: And it is certificate of appealability.

THE COURT: 2253. There is a reason why Mr. Besser here. Title 28, unless a judge issues a certificate of appealability, appeal will at the time be taken to the court of appeals in the final order of a habeas proceeding in which the detention arises out the process by the state court.

I will allow certificate of appealability if you want to appeal. I will have that out in a half hour, but I will not stay the state court's proceeding. You have a lot of argument both in the petition and reply. I will issue a certificate of appealability, but I will not stay the proceedings. If you want to proceed with this wherever, I will do that --

MR. WISE: Thank you

MS. DAY: Just for the record --

THE COURT: On the certificate of appealability, I believe there is a double jeopardy issue that is worthy of

6th Circuit.

MS. DAY: As far as order denying petition and stay, unfortunately I didn't bring one.

THE COURT: You don't need one. I will have it out by 11:00. I will go back and --

MS. DAY: Will you do one on all three?

THE COURT: I will do the order denying the petition for reasons stated on the record, I will do the order denying the stay and the third one was certificate of appealability. It may take a little longer than 11:00. It will be done before 11:30.

MS. DAY: I can pick it up in the chambers?

THE COURT: It will be here.

MS. DAY: Thank you.

THE COURT: All right.

(Proceedings concluded.)

* * *

CERTIFICATE OF COURT REPORTER

I certify that the foregoing is a correct transcript of recorded proceedings in the above-entitled matter.

/s/ Ronald A. DiBartolomeo — September 21, 1999

Ronald A. DiBartolomeo, CSR — Date

(313) 962-1234

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

vs.

CASE NO. 96-143907
SC: 112929
COA: 206480

GERALD JOSEPH PALAZZOLO,
Defendant-Appellant.

ORDER

Michigan Supreme Court
Filed 5/25/99

On order of the Court, the application for leave to appeal from the August 4, 1998 decision of the Court of Appeals is considered, and it is **DENIED,** because we are not persuaded that the questions presented should be reviewed by this Court.

Young, Jr., J., not participating.

I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

May 25, 1999
Date

/s/ Corbin R. Davis
Clerk

STATE OF MICHIGAN
COURT OF APPEALS

May 14, 1998

Weiss Arthur Jay
30445 Northwestern Highway
Suite 200
Farmington Hills, MI 48334-0000

Panel: WB Murphy
Young Robert
Smith Michael R.

Re: #206480 People of Michigan v. Gerald J. Palazzolo; Item No. 32 L/CRT #96143907

State of Michigan Court of Appeals Filed 5/14/98

Dear Counsel:

Please be advised that the above captioned appeal is being considered by the court for a decision WITHOUT ORAL ARGUMENT pursuant to MCR 7.214(e). If the court decides oral argument is not necessary, a decision will be rendered in the appeal without further notice to you.

Yours Very Truly,
Carl Gromek
Chief Clerk

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellant,

vs.

CASE NO. 96-143907-FC
Oakland Circuit Court
No. 206480
UNPUBLISHED
August 4, 1998

GERALD JOSEPH PALAZZOLO,
Defendant-Appellee.

State of Michigan Court of Appeals Filed 8/4/98

Before: Murphy, P.J., and Young, Jr. and M.R. Smith*, JJ.

MEMORANDUM.

Plaintiff appeals by delayed leave granted the circuit court order partially granting defendant's motion to quash. We reverse. This appeal is being decided without oral argument pursuant to MCR 7.314(E).

*Circuit judge, sitting on the Court of Appeals by assignment.

Defendant was charged with first-degree criminal sexual conduct, MCL 750.520b; MSA 28.788(2), arising out of the sexual assault of his adopted daughter. The daughter testified at the preliminary examination that defendant came into her room at night and touched her vagina with his fingers. Her testimony did not indicated and penetration. Defendant made a statement to police admitting that he penetrated his daughters with his fingers.

Defendant moved to quash the information in circuit court, asserting that the *corpus delicti* of first-degree criminal sexual conduct was not established by independent evidence prior to the admission of his confession. The court found that the *corpus delicti* of first-degree criminal sexual conduct required a showing of penetration, and partially granted the motion to quash. Defendant subsequently pleaded no a contest to second-degree criminal sexual conduct.

The *corpus delicti* rule arose in order to prevent a defendant's confession from being used to convict him of a crime that never occurred. *People v. Konrad*, 449 Mich 263, 269; 536 NW2d 517 (1995). The rule provides that a defendant's confession may not be admitted unless there is direct or circumstantial evidence independent of the confession establishing the occurrence of a specific injury and that some criminal agency was the source of that injury. *People*

v. Cotton, 191 Mich App 377, 389; 478 NW2d 681 (1991). A defendant's confession may then be used to elevate the crime to one of a higher degree or to establish aggravating circumstances. *Id.*

Here, complainant's preliminary examination testimony was sufficient to establish a specific injury, which was caused by a criminal agency. Once this evidence was presented, defendant's confession was properly admitted to elevate the crime to a higher degree. *People v. Williams*, 422 Mich 381, 392; 373 NW2d 567 (1985). The trail court erred in finding that defendant's confession was inadmissible, and in quashing the first-degree criminal sexual conduct charge.[1]

Defendant argues that further proceedings below are barred by the double jeopardy clause, where he has already pleaded no contest to second-degree criminal sexual conduct and served the confinement portion of his sentence. However, this Court has held that when a plea and sentencing occur on a reduced charge, and the basis for the reduction is later overturned on appeal, jeopardy does not

---

[1]We decline plaintiff's invitation to abolish the corpus delicti rule in light of recent Supreme Court precedent. *People v. McMahan*, 451 Mich 543; 548 NW2d 199 (1996).

attach. *People v. Howard,* 212 Mich App 366, 370; 538 NW2d 44 (1995).

We direct that this case be remanded to the circuit court and the original charge of first-degree criminal sexual conduct be reinstated.

Reversed. We do not retain jurisdiction.

/s/ William B. Murphy
/s/ Robert P. Young, Jr.
/s/ Michael R. Smith

STATE OF MICHIGAN
IN THE COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellant,

CASE NO. 96-143907-FC

vs.

GERALD JOSEPH PALAZZOLO,
Defendant-Appellee.

State of Michigan Court of Appeals Filed 9/30/97

STATEMENT OF FACTS EXPLAINING DELAY

1. On or about May 6, 1997, the Oakland County Circuit Court granted Defendant's motion to reduce the charge from first degree criminal sexual conduct to second degree criminal sexual conduct. Defendant pled guilty to second degree csc on June 16, 1997. He was sentenced on July 23, 1997.

2. I received this appeal for referral on August 15, 1997, and the necessary transcripts were requested on September 4, 1997.

3. A timely Claim of Appeal was filed in this Court on September 8, 1997. (Docket No. 206045). However, the Claim of Appeal was not properly filed, because Defendant pled guilty to the charged offense, and the charged offense occurred after December 27, 1994. On September 24, 1997, the People sent Stipulation Dismissing Claim of Appeal to Defense Counsel for his signature.

4. The requested transcripts were filed in the circuit court on September 11, 1997.

5. This Delayed Application for Leave to appeal was filed within twenty-one days from the date the transcripts were filed in the Oakland Circuit Court.

6. This Application is untimely because a Claim was filed by mistake. Moreover, I waited until the requested transcripts were transcribed before filing this Application. Being unfamiliar with this case, I strongly believed that I should familiarize myself with the facts of this case and the lower court's rulings before filing this Application.

Respectfully submitted,

DAVID GORCYCA
PROSECUTING ATTORNEY
OAKLAND COUNTY

BY: /s/ Marilyn J. Day

Marilyn J. Day (P44116)
Assistant Prosecuting Attorney
1200 North Telegraph Road
Pontiac, Michigan 48341
(248) 858-0685

Date: September 30, 1997

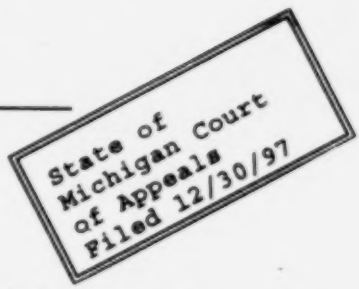
STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff,

CASE NO. 96-143907-FC

vs. **Docket No. 206045**

GERALD JOSEPH PALAZZOLO,
Defendant.



ORDER

Maura D. Corrigan, Chief Judge, acting under MCR 7.211(E)(2), orders:

The claim of appeal is **DISMISSED** for lack of jurisdiction. MCR 7.216(A)(10). There is no claim of appeal by right from a guilty plea involving an offense committed after December 27, 1994. Const 1963, Art 1 Sec 20, MCR 7.203. Dismissal is without prejudice to whatever other relief may be available consistent with the Court Rules.

A true copy entered and certified by Ella Williams, Chief Clerk, on

December 30, 1997	/s/ Ella Williams
Date	Chief Clerk

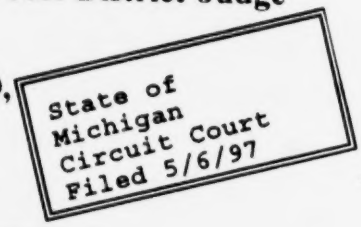
STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE
COUNTY OF OAKLAND

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff,

vs.

CASE NO. 96-143907-FC
Hon. Nanci J. Grant
U.S. District Judge

GERALD JOSEPH PALAZZOLO,
Defendant.



Mary M. Stiel (P45114)
Asst. Prosecuting Attorney
1200 North Telegraph Rd
Pontiac, MI 48341
(248) 858-0656

Arthur Jay Weiss (P25225)
Attorney for Defendant
30445 Northwestern Hwy
Suite 200
Farmington, MI 48334-3175
(248) 855-5888

OPINION AND ORDER

At a session of said Court, held in the Courthouse in the City of Pontiac, County of Oakland, State of Michigan on the 6th day of May, 1997.

PRESENT: HON. NANCI J. GRANT, CIRCUIT JUDGE

This matter, having come before the Court on Defendant Gerald Palazzolo's Motion to Quash Information or in the Alternative to Reduce Charge, Defendant's motion is hereby **GRANTED IN PART.**

Defendant was bound over for trial on a single charge of first-degree criminal sexual conduct, MCL 750.520b, based on allegations that he sexually penetrated a minor under the age of 13 years. At the preliminary examination, the victim testified that on one occasion in June, 1995, Defendant placed his hand on her vagina. The victim also testified that she was wearing underwear at the time and that the touching occurred "over" her underwear. The victim did not testify that she was penetrated during this incident. In addition to the victim's testimony, the prosecutor also introduced the Defendant's confession, in which he admitted that he digitally penetrated the victim and her sister on unspecified occasions. Defendant now appeals the magistrate's bindover decision, arguing that his confession could not be used to establish probable cause to believe Defendant committed CSC I. Consequently, the charges should either be dismissed, or reduced to CSC II or CSC IV.

Defendant's argument is based on the *corpus delicti* rule. That rule is designed to prevent the use of a defendant's confession to convict him of a crime that did

not occur. Specifically, the rule provides that a defendant's confession may not be admitted unless there is direct or circumstantial evidence independent of the confession establishing (1) the occurrence of the specific injury and (2) some criminal agency as the source of the injury. *People v. Konrad*, 449 Mich 263, 269-270 (1995).

Defendant first argues that, under the *corpus delicti* rule, the prosecutor cannot use a defendant's confession until the prosecutor has introduced non-confession evidence sufficient to establish every element of the crime charged. Defendant correctly observes that penetration is an essential element of first-degree criminal sexual conduct. *People v. Hammons*, 210 Mich App 554, 556 (1995). Defendant is also correct that, other than his confession, no evidence of "penetration" was presented at the preliminary examination. Thus, Defendant concludes, the *corpus delicti* rule precluded the use of his confession to prove first-degree criminal sexual conduct, and the information should be quashed or the charge reduced. In support of this proposition Defendant cites *People v. Allen*, 390 Mich 383 (1973).

Defendant's interpretation of the rule is incorrect: the prosecutor need not produce non-confession evidence on every element of the crime in order to establish the of the crime. See, e.g., *People v. Williams*, 422 Mich 381, 391 (1985) (to establish *corpus delicti* of first-degree

premeditated murder, prosecutor need not introduce non-confession evidence of premeditation and deliberation); *People v. Cotton*, 191 Mich App 377 (1991) (to establish of assault with intent to rob while armed, prosecutor need not introduce non-confession evidence of intent to rob).

Defendant claims that *Cotton* cannot be applied to the present case because it "stands in obvious contradiction" of the Supreme Court's decision in *Allen*. This claim has several flaws. First, the precedential value of *Allen* is questionable in light of the Supreme Court's subsequent decision in *Williams* and its decision to deny leave to appeal in *People v. Emerson (After Rem)*, 203 Mich App 345 (1994), lv den 448 Mich 931 (1995). Second, the Supreme Court denied leave to appeal in *Cotton*. 439 Mich 932 (1992). Finally, the Supreme Court cited Cotton with approval in *Konrad, supra*, 449 Mich 269-270. This strongly suggests that the Supreme Court (1) does not share Defendant's views on the validity of *Cotton*, and (2) does not agree with Defendant's claim that the *corpus delicti* rule requires non-confession evidence on every element of the offense.

Notwithstanding the foregoing, Defendant also argues that the prosecutor did not establish the *corpus delicti* in present case. With this assertion the Court agrees. In considering this issue, the Court concurs in the

magistrate's conclusion that there is no Michigan case law describing the *corpus delicti* of first-degree criminal sexual conduct.

As previously discussed, the *corpus delicti* rule requires that the prosecutor introduce evidence of "the occurrence of the specific injury" before he can introduce the defendant's confession to that crime. *Konrad, supra,* 449 Mich 269-270. Moreover, Defendant correctly observes that "one object of the Legislature in providing for degrees of criminal sexual conduct was to differentiate between sexual acts which affected on the body surface of the victim and those which involved intrusion into the body cavities." *People v. Bristol,* 115 Mich App 236, 238 (1981). Thus, a CSI I conviction requires a showing of penetration, while a SCS II or CSC IV conviction requires only a showing of "sexual contact." MCL 750.520c; MCL 750.520e. Based on the foregoing, the Court concludes that evidence of penetration is part of the *corpus delicti* of first-degree criminal sexual conduct.

The prosecutor disputes this conclusion by citing *Cotton, supra.* Specifically, the prosecutor focuses on the following language in that opinion:

> The *corpus delicti* rule is satisfied in any criminal case if the prosecution shows that

> the specific injury or loss has occurred and that some person's criminality was the source or cause of the injury. *A defendant's confession then may be used to elevate the crime to one of a higher degree or to establish aggravating circumstances.* *[Cotton, supra,* 191 Mich App 379 (emphasis added).]

Further support for this position can be found in *Williams, supra,* 422 Mich 391 (to establish *corpus delicti* of first-degree premeditated murder, prosecutor need not introduce non-confession evidence of premeditation and deliberation).

Cotton and *Williams* are distinguishable, however, because in those cases the prosecution's non-confession evidence established "the occurrence of the specific injury" (in *Williams* it was the victim's death, and in *Cotton* it was the assault on the victim). The "specific injury" in the present case, on the other hand, is "sexual penetration," which the prosecutor's non-confession evidence did not establish. Thus, *Cotton* and *Williams* stand only for the proposition that the *corpus delicti* of a crime does not include evidence of the perpetrator's intent. Those cases do not stand for the proposition that penetration is not part of the *corpus delicti* of first-degree criminal sexual conduct.

Moreover, Defendant's argument is consistent with other applications of the *corpus delicti* rule. For example, in *People v. Gould*, 156 Mich App 413 (1986), the defendant was charged with false pretenses, MCL 750.218, after presenting a false application for unemployment benefits. The elements of that crime are, among other things, that the defendant made a false representation and that the victim relied on it to his detriment. The prosecution's non-confession evidence, however, did not establish that the MESC relied in any way on the false statements in the application. Therefore, the *corpus delicti* rule was not satisfied, and the prosecutor could not use the defendant's confession to establish that charge. *Id* at 416-17.

The Court used similar reasoning in *Konrad, supra*. In that case, the defendant was charged with possession with intent to deliver cocaine. The prosecutor's non-confession evidence established only that the drugs existed, and that they were possessed by *someone*. Without the defendant's confession, however, the prosecutor was unable to establish that the defendant was the person who possessed the drugs. The Court ruled that the identity of the person who possessed the drugs was not part of the *corpus delicti* of the crime. Rather, the *corpus delicti* of that offense consisted only of evidence that the drugs existed and that they were possessed by someone. *Konrad, supra*, 449 Mich 269-270.

These rules, coupled with *Williams* and *Cotton*, suggest that the *corpus delicti* rule is concerned with

evidence that the crime *occurred,* not so much with whether this particular defendant committed it, or with the perpetrator's state of mind when he committed it. In the context of a first-degree criminal sexual conduct prosecution, this means that the *corpus delicti* of that crime includes a showing that sexual penetration occurred.

In the present case, the victim described "sexual contact" by the Defendant. The prosecutor failed to elicit any testimony from the victim that she was penetrated, and failed to produce any other non-confession evidence on this issue. Without such evidence, the Court has no choice but to conclude that the prosecutor failed to establish the *corpus delicti* of first-degree criminal sexual conduct. Consequently, the Court cannot deny Defendant's motion and must reduce the charge to second-degree criminal sexual conduct, MCL 750.520c.

/s/ Nanci J. Grant
NANCI J. GRANT, Circuit Judge

PROOF OF SERVICE

I certify that a copy of the above instrument was serviced upon the attorney of the above case by mailing it to the attorneys at their business address as disclosed by the pleadings of record, with prepaid postage on May 6, 1997.

Kathleen M. Morton, Secretary to the Hon. Nanci J. Grant

STATE OF MICHIGAN CIRCUIT COURT
FOR THE
COUNTY OF OAKLAND
SIXTH JUDICIAL CIRCUIT

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff,

CASE NO. 96-143907-FC

vs.

GERALD JOSEPH PALAZZOLO,
Defendant.

PLEA

BEFORE THE HON. NANCI J. GRANT,
Judge of Circuit Court
Monday - June 16, 1997

Kathleen A. Milam
CSR- 1088
Certified Shorthand Reporter

J-1

APPEARANCES

Oakland County Prosecutor's Office
BY: MARY STIEL
On behalf of the People of the State of Michigan
1200 N. Telegraph Rd.
Pontiac, MI

ARTHUR JAY WEISS
On behalf of the Defendant
30445 Northwestern Highway
Suite 200
Farmington Hills, MI 48334-3175

INDEX

WITNESSES:	Page
Garald Palazzolo	8
Examination by the Court	8
None called	
None called	

People's Exhibits:	Marked	Received
none offered		

Defendant's Exhibits:	Marked	Received
none offered		

Pontiac, Michigan
Monday - June 16, 1997

* * *

THE CLERK: Your Honor, calling the case of People v Gerald Palazzolo, Case Number 96-143907-FC.

MS. STIEL: Good morning, your Honor. May it please the court, Mary Stiel appearing on behalf of the People.

MR. WEISS: Good morning, your Honor.please the Court, Arthur Weiss on behalf of Mr. Palazzolo.

MS. STIEL: Your Honor, may the record reflect that today is the date and time actually scheduled for trial in this matter.

The Defendant was originally charged with count of First Degree Criminal Sexual Conduct.

This Court granted the Defendant's motion reduce that charge to Second Degree Criminal Sexual Conduct.

I am not certain that our office will appeal ruling. I will only state for the record so the Defendant knows, it's possible that we may.

I understand the Defendant is going to offer a plea to that reduced charge at this time.

MR. WEISS: First of all -- again, for the record, Arthur Weiss on behalf of the Defendant.

This is the first time I've heard that there would be

any possible appeal from the Court's ruling.

It would be my position that the Court entered its decision quite some time ago and the People had more than ample opportunity if they wanted to seek an interlocutory appeal.

I don't want to by, proceeding today, somehow consent either overtly or covertly to the Prosecutor's machinations that at some point in the future they are going to appeal this.

Quite frankly, I am taken by surprise that it's now come to light right on the eve of when we are going to proffer a plea here.

We had a discussion in Chambers. To the best of my knowledge, it was not raised then. I did ask Miss Stiel when the Court initially rendered its ruling whether or not there would be an appeal and got nothing.

Now if this is simply a matter of protecting the record, that's one thing. If it's simply a matter of that there is going to be some type of interlocutory appeal, then I think that we have to be aware of it so we are not sandbagged.

MS. STIEL: Your Honor, there's no attempt to sandbag. 42 days for the filing of a claim for an appeal on this case doesn't run until the Judgment Of Sentence is entered.

This is not a case where an interlocutory appeal should be sought because there's still appellate review after

the decision. So there's no need for an interlocutory appeal.

I don't know that there will or won't be. I told Mr. Weiss that I have to review the case with my superiors. The Defendant, by tendering a plea, is not consenting to an appeal or anything. We still would have to seek leave to appeal in the Court of Appeals and it's at their discretion. I just wanted to state that on the record because I honestly don't know whether there will be one or won't but I thought that it would be proper to state that.

I don't think it has any bearing on the Defendant. The Defendant is not waiving any claims or rights by tendering a plea today but I thought that he should know that it was a possibility.

MR. WEISS: I will take the Prosecutor's statement that we're not waiving anything by proceeding today and including double jeopardy.

Your Honor, we would ask the Court to take a nolo contendere plea in this matter. There has been threats of civil litigation and under the Court Rule, I think it would be appropriate.

THE COURT: All right. Do you want to swear him in?

THE CLERK: You do solemnly swear the testimony you are about to give before this court is the whole truth so help you God?

THE DEFENDANT: I do.

GERALD PALAZZOLO

having been called as a witness by the Defense, being first duly sworn by the Clerk, was examined and testified under oath as follows:

EXAMINATION

BY THE COURT:

Q. Could you state your complete name for the record, sir?

A. Gerald Joseph Palazzolo.

Q. Mr. Palazzolo, how old are you?

A. 39.

Q. Can you read, write and understand the English language?

A. Yes, your Honor.

Q. Can you hear and understand me?

A. Yes.

Q. Could you hear and understand your attorney?

A. Yes.

Q. Are you satisfied with the advice of your attorney?

A. Yes, I am.

Q. Do you understand that you are pleading no contest to --

THE COURT: Do you have a new Information?

MS. STIEL: Your Honor, I have not -- we have not filed --

Q. (BY THE COURT): -- Criminal sexual conduct - Second Degree?

MS. STIEL: That's correct, your Honor. -

A. Yes.

MS. STIEL: Just so the record is clear, the People do objection to a no contest plea.

THE COURT: All right. That's fine.

Do the People -- I don't have it in front of me what the maximum --

MR. WEISS: 15 years, your Honor.

THE COURT: Thank you very much.

Q. (BY THE COURT): Mr. Palazzolo, do you understand that the most time that you can get for such an offense is 15 years in jail or prison?

A. Yes, your Honor.

Q. Pursuant to People v Cobbs, did you hear the statements your attorney made on the record regarding sentencing in this matter?

A. Yes.

Q. Is there a plea bargain in this matter?

A. No.

Q. Do you understand that you have a right to have your own lawyer represent you from start to finish including trial, sentence and an application for appeal and the Court will appoint a lawyer for you - if you if you cannot afford a lawyer of your own choice?

A. Yes.

Q. Do you understand that you have a right to a trial by a jury or the Court without a jury if the Prosecutor and the Court agree?

A. Yes.

Q. Do you understand that throughout the trial you are presumed innocent until the Prosecutor proves your guilt beyond a reasonable doubt?

A. Yes, your Honor.

Q. Do you understand that you have a right to have all the witnesses against you appear at trial; to have your lawyer ask the witnesses questions and to have the Court order any witnesses that you may have to appear at trial?

A. Yes.

Q. Do you understand you don't have to testify at trial and nobody can say anything about you not testifying or hold it against you?

A. Yes.

Q. On the other hand, you have the right to testify at trial if you want to testify?

A. Yes.

Q. Do you understand that if the Court accepts your no contest plea you will not have a trial of any kind and you will be giving up all these rights I have told you about?

A. Yes, your Honor.

Q. Do you understand that you will be giving up any claim that the plea was a result of promises and threats that were not disclosed to the Court and it was not your choice to plead no contest?

A. Yes.

Q. Do you understand that any appeal from the conviction and sentence following the no contest plea will be by application for leave to appeal and not by right?

A. Yes, your Honor.

Q. Do you understand that a plea of ho content means you have a conviction?

A. Yes.

Q. Do you understand that if you are on probation or parole, this plea could affect your probation or parole status?

A. Yes.

Q. Has anyone threatened you to plead no Contest?

A. No.

Q. Is it your own choice to plead no contest?

A. Yes.

Q. And this offense occurred in Township of Clawson?
A. Yes.

THE COURT: What are the factual basis?

MR. WEISS: Your Honor, we would stipulate to the Court utilizing the Preliminary examination transcript.

MS. STIEL: I would ask that the Court rely on the police report in this matter as it is more complete.

MR. WEISS: Either way.

THE COURT: All right.

MS. STIEL: May I approach with a copy of same, your Honor?

THE COURT: Thank you.

Counsel, do you find the Court complied with the applicable Court Rules and that there are no other promises, threats or inducements other than those placed on the record?

MS. STIEL: Yes, your Honor.

THE COURT: I am going to accept the police report as the basis, the factual basis in this matter.

MR. WEISS: No objection, your Honor.

THE COURT: Mr. Weiss, do you find that the Court complied with the applicable Court Rules and that there were no any other promises, threats or inducements other than those placed on the record?

MR. WEISS: No, just that we had a discussion

regarding the Cobbs Agreement that the Court would stay within the guidelines.

THE COURT: Correct. I already had thought that we had that on the record but I will make it clear, the Cobbs is within guidelines.

MR. WEISS: Thank you.

THE COURT: The Court finds that the plea is freely, voluntarily, intelligently, and accurately made and there exists a factual basis for plea.

Sentencing in this matter will be July 22, 1997, 1:30 in the afternoon.

Counsel, I need you to refer this over to probation.

MR. WEISS: Yes.

THE COURT: Yes. Wait a second. 1:30, July 23rd.

MS. STIEL: Thank you, your Honor.

THE COURT: Thank you.

(Hearing concluded)

* * *

* *

STATE OF MICHIGAN
CIRCUIT COURT FOR THE COUNTY
OF OAKLAND
SIXTH JUDICIAL CIRCUIT

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff,

CASE NO. 96-143907-FC

vs.

GERALD JOSEPH PALAZZOLO,
Defendant.

SENTENCE

BEFORE THE HON. NANCI J. GRANT,
Judge of Circuit Court
Wednesday - July 23, 1997

Kathleen A. Milam
CSR-1088
Certified Shorthand Reporter

K-1

APPEARANCES

Oakland County Prosecutor's Office
BY: MARY STIEL
On behalf of the People of the State of Michigan
1200 N. Telegraph Road
Pontiac, MI

ARTHUR JAY WEISS
On behalf of the Defendant
30445 Northwestern Highway
Suite 200
Farmington Hills, MI 48334-3175

INDEX

WITNESSES:	Page
None called	

WITNESSES: For the Defense	Page
DANIEL O'NEIL	6
Direct Examination by Mr. Weiss	6
Cross-Examination by Ms. Stiel	13
Redirect Examination by Mr. Weiss	14
Recross-Examination by Mr. Stiel	15
REV. RONALD PREISLER	16
Direct Examination by Mr. Weiss	16
Cross-Examination by Ms. Stiel	18
TIMOTHY STERNAD	19
Direct Examination by Mr. Weiss	19
BONNIE JOHNSON	21
Direct Examination by Mr. Weiss	22

People's Exhibits:	Marked	Received
None offered		

Defendant's Exhibits:	Marked	Received
DX-A		10

Pontiac, Michigan
Wednesday - July 23, 1997

* * *

THE CLERK; Your Honor, calling the matter of People vs. Palazzolo, Case number 96-143907-FC.

MR. WEISS: Good afternoon, your Honor. Mary Stiel appearing on behalf of the People. I think Defense Counsel in the hallway.

(Matter briefly passed)

(Discussion off the record)

THE CLERK: Recalling People vs. Palazzolo, Case number 96-143907-FC.

MS. STIEL: Mary Stiel appearing on behalf of the People.

MR. WEISS: Good afternoon. May it please the Court, Arthur Weiss on behalf of Gerald Palazzolo. I have to say again, I'm not in the habit of making parties for attorneys wait as long as I did. I did not anticipate almost a three-hour hearing on this.

MS. STIEL: No problem, your Honor.

MR. WEISS: I trust the Court got the call from my office that I was tied up in Southfield District Court?

THE COURT: You lucked out.

MR. WEISS: May Counsel approach for a moment?

THE COURT: Yes.

(Bench discuss off the record)

MR. WEISS: Is the Court ready to proceed?

THE COURT: Yes.

Are you calling this man as a witness?

MR. WEISS: Yes.

THE COURT: You do solemnly swear the testimony you are about to give before this court is the whole truth so help you God?

MR. O'NEIL: I do.

DANIEL O'NEIL

having been called as a witness by the Defense, being first duly sworn by the Clerk, was examined and testified under oath as follows:

THE COURT: Please take a seat in witness stand and state your name for the record.

THE WITNESS: Daniel O'Neil, O-N-E-I-L.

DIRECT EXAMINATION

BY MR. WEISS:

Q. How are you employed, Mr. O'Neil?

A. I'm employed by Family Consultation and Treatment Services in Clawson, Michigan.

Q. What kind of facility or entity is that?

A. It's a private clinic that deals specifically with treating victims and offenders in regards to criminal sexual conduct cases.

Q. Would you briefly describe your educational background starting with the graduation of high school?

A. High school graduation, 1966. Bachelors Degree--

MS. STIEL: Your Honor, I will stipulate to his qualifications.

MR. WEISS: This is going to be very brief, your Honor, but I think that the Court should get a sense of what this -- the basis upon which this man is going to proffer an opinion.

THE COURT: Go ahead.

THE WITNESS: Bachelors Degree 1970; 1975, Master's Degree in Clinical Psychology; graduate training in specialized assessment at the University of Michigan.

Q. Have you testified -- I'm sorry. I didn't mean to cut you off.

A. That's okay.

Q. Have you ever testified in court before?

A. Yes, sir.

Q. Have you ever been appointed by the Court as an expert?

A. Yes, both in Oakland County and Macomb County.

Q. Which judges on this particular Bench have you been employed by?

A. Judge Andrews. We also testify quite regularly in Probate Court in front of Judge Grant, Judge Moore.

Q. All right. Are you familiar with Leo Niffeler?

A. Yes.

Q. And who is Leo Niffeler?

A. Leo Niffeler is the clinical supervisor of Family Consultation and Treatment Services.

Q. And are you aware of the fact that Mr. Palazzolo presented himself to Mr. Niffeler in December of 1995?

A. Yes, I am.

Q. And do you have any personal knowledge regarding that interview?

A. I have talked specifically with Mr. Nieffeler regarding the contents of that interview and have carefully reviewed the report that he prepared following that interview.

Q. Since the -- since that interview and the preparation of the report, have you had occasion to come in contact with Mr. Palazzolo?

A. Yes, I have.

Q. How often do you come in contact with him?

A. Weekly for a 90-minute session in group therapy specific to adult sex offenders.

Q. And basically what does that therapy session consist of?

A. It consists of us treating and evaluating each of the offenders, helping them figure out reasons why they committed their crime and more importantly, to develop a plan to prevent recidivism.

Q. As part of your consultation and treatment, do you prepare progress reports or progress report cards?

A. On each of the members of our group therapy program we send monthly reports to concerned parties, whether they be attorneys, court personnel, et cetera.

Q. Okay. Are these reports prepared in the ordinary course of your business?

A. Yes.

Q. Are they prepared at or near the time of the therapy sessions encompassed within the report?

A. Yes, they are.

Q. Are they prepared by yourself?

A. Yes.

Q. Are they true and accurate to the best of your knowledge, information and belief?

A. Yes, they are.

MR. WEISS: Your Honor, if I may approach the witness?

Q. (BY MR. WEISS): Sir, I now hand you what has been collectively marked as Defendant's Proposed Exhibit A and ask if you if you can identify those?

A. Yes. These are -- appear to be copies of the monthly reports that are prepared regarding Mr. Palazzolo's progress in our program.

Q. All right.

MR. WEISS: Your Honor, for the record, I have previously shown those to the Assistant Prosecutor and at this time I would move for their admission.

MS. STIEL: No objection.

THE COURT: Did you mark it as A? I am sorry.

MR. WEISS: Collectively as A.

THE COURT: Exhibit A is admitted.

(Defendant's Exhibit A received into evidence)

MR. WEISS: Would the Court like to review them?

THE COURT: Go ahead.

Q. (BY MR. WEISS): On the basis of your clinical involvement with Mr. Palazzolo as well as your experience and training, are you able proffer any opinions on behalf of Mr. Palazzolo as they relate to this charge?

A. Yes, I am.

Q. Would you proffer those opinions, please?

A. He has been actively involved in our program for 18 months and the typical stay for our adult offenders is 18 months to 24 months.

He's made good progress right from the start because of his honesty and openness. He's been not in any kind of denial about the severity of his crime, the frequency, duration, all aspects that would prevent him from moving on in his treatment. So he has made good progress.

He's also been able to understand the reasons for his offense, to address issues that were occurring in his life at the time of the offense.

He also has a very good sense of victim empathy and that's something that we really look forward to with our offenders in being a good gauge for whether or not they will be a risk for any type of recidivism.

Q. Are you able to proffer any opinion as to the likelihood that Mr. Palazzolo would engage in recidivism?

A. He has a very, very low risk to reoffend at this time.

Q. Given the fact that at time you and your partner have been designated by the Court to be an expert, are you able to proffer any opinion as to whether or not Mr. Palazzolo should be incarcerated?

MS. STIEL: Objection, your Honor. Irrelevant. That's for the Court to determine.

THE COURT: Sustained.

Q. (BY MR. WEISS): In terms of any therapeutic value or justification, would incarceration be beneficial?

A. At this point, the only thing that would be beneficial would be for him to continue with his treatment specific to sex offenses and continue to provide for his family because for him that's been a very important part of his recovery process that he's been able to provide for his family and take care of the financial obligations that he's incurred throughout the course of some of his life.

Q. Would incarceration -- the converse, would incarceration have a debilitating affect on those aspects.?

A. At this point, I think incarceration would be more damaging to his progress than for him to continue out in society because he -- if he's incarcerated, he looses quite a bit of ground both financially and in regards to treatment and coping strategies.

The things that he's made the best progress on have been issues that he can use in his daily life. And for him to continue to use those in the outside

world is probably going to be most beneficial to his continued recovery.

MR. WEISS: Thank you. Nothing further, your Honor.

CROSS-EXAMINATION

BY MS. STIEL:

Q. Is it Dr. O'Neil?

A. No, ma'am. I have a Master's Degree.

Q. Mr. O'Neil, have you through the course of your participation in this case, had a chance to evaluate the victims in this case?

A. I have not had any access to the victims, no.

Q. As a result, do you have any -- can you offer any opinion as to the impact of this crime on them individually?

A. I have not seen them and we have asked Mr. Palazzolo probably monthly as to their progress in their treatment or how they're managing and he's been not able to gather any of that information as well.

Q. Okay. So is it also true, sir, that your opinion about whether or not incarceration is beneficial is based solely on your opinion about what is in his best interest?

A. Not so much on his best interest but on his overall picture.

He's what's referred to as, in our business as a regressed offender. So that mean he is very capable of adult, regular relationships and in his time of stress or whatever, regressed to this offense with children. So these kinds of offenders are very good candidates for treatment outside of the penal system.

MS. STIEL: I have no further questions for this witness, your Honor.

MR. WEISS: Just one.

REDIRECT EXAMINATION

BY MR. WEISS:

Q. If the record was to indicate that the young girl who was the victim here had once gone to a therapist and had never gone back, would you be able to draw anything from that observation?

A. I think I would have to be very careful without actually seeing the child but if the person was indeed -- if the child was indeed evaluated by a competent person and the clinician felt that the child didn't need further treatment, it would indicate

possibly that the child has sustained the trauma pretty well.

MR. WEISS: Thank you.

RECROSS-EXAMINATION

BY MS. STIEL:

Q. Mr. O'Neil, you have no idea as to why counseling was not obtained for the victims?

You've had no contacts with the victim in this case?

A. No, ma'am, I have not.

MS. STIEL: No further questions.

MR. WEISS: Nothing, your Honor. Does the Court have any questions?

THE COURT: No. Thank you. Thank you, Mr. O'Neil.

THE CLERK: You do solemnly swear the testimony you are about to give before this court is the whole truth so help you God?

REV. PREISLER: I do.

REV. ROLAND PREISLER,

having been called as a witness by the Defense, being first duly sworn by the Clerk, was examined and testified under oath as follows:

THE CLERK: Please be seated in witness stand.

DIRECT EXAMINATION

BY MR. WEISS:

Q. State your name for the record please?

A. Roland Preisler.

Q. And your occupation, sir?

A. Senior Pastor of Fellowship Bible Church.

Q. And where is that located?

A. The office is located in East Point, Michigan and the church assembles for worship in Warren, Michigan.

Q. Have you had contact with Mr. Gerry Palazzolo?

A. Yes, I have.

Q. How did you come into contact with him?

A. Gerry was invited to our church by a friend of his from work and he began attending early in '96 and I have known him as a attender and as a member of our church ever since.

Q. And during the approximate last year and a half, have you had an opportunity to discuss Mr. Palazzolo with other parishioners and individuals that you come in contact with?

A. I have had an opportunity to discuss the situation with his friend and with our Board but not beyond that.

Q. And how would it come about that you would discuss the situation with your Board?

A. I am accountable to my Board for all counseling matters that I deal with and so I needed to do that.

Q. And as a result of the conversations you had with your board, what transpired?

A. Well, our Board is in prayer for Mr. Palazzolo and is very concerned about his situation obviously.

Q. Okay. Did you allow him to continue as a parishioner in your church?

A. Yes, we have.

Q. Okay. On what basis did that occur?

A. Variety of things. Mr. Palazzolo, I think, exemplifies to all of us a Godly character.

If any of this, indeed, has occurred, as he himself has said, it's difficult for me to envision it because he has become a very faithful member of our church. He was Baptized in August of last year.

He has participated in virtually everything that he could. It's a small congregation. He is there on a consistent basis. He serves in a number of areas in the church and so it is our opinion that he is a model Christian and I do not say that with any exaggeration.

Q. Thank you very much, sir.

MR. WEISS: No further questions. Thank you, your Honor.

CROSS-EXAMINATION

BY MS. STIEL:

Q. Sir, do you know any of the facts underlying his present conviction for Second Degree Criminal Sexual Conduct?

A. I have a limited knowledge of what he has shared with me.

Q. Okay. What has he shared with you in that regard?

A. He shared with me that he had committed an offense of molestation of his daughter and he told me that very honestly and he told me he was wrong and told me he was guilty. I was very impressed with his forthrightness.

Q. Did he give you any specifics regarding the molestation?

A. I asked him not to.

Q. Okay. So your knowledge or understanding of the facts that underlies this conviction is limited?

A. Correct.

Q. Have you had any contact with the victims in this particular case?

A. Not at all.

MS. STIEL: I have no further questions, your Honor.

MR. WEISS: No redirect, your Honor. Does the Court have any questions?

THE COURT: No. Thank you.

THE CLERK: You do solemnly swear the testimony you are about to give before this court is the whole truth so help you God?

MR. STERNAD: I do.

TIMOTHY STERNAD

having been called as a witness by the Defense, being first duly sworn by the Clerk, was examined and testified under oath as follows:

THE CLERK: Please be seated in witness stand.

DIRECT EXAMINATION

BY MR. WEISS:

Q. Would you state your name for the record, sir?

A. It's Timothy Sternad.

Q. Okay. And do you know Mr. Palazzolo?

A. Yes.

Q. In what context do you know him?

A. I met him at work probably in '95. At that point in time, we had an interest in music and audio and we weren't real, real close, but over a period of time we

became friends and he seemed to be searching in his life for something and I invited him to come out to the church and he became involved in different aspects.

He's working right now in a ministry for -- at the Rescue Mission. It's just one example; working with people that have had substance abuse and just many different areas and, you know, he's been very involved in that and -- but I have been friends with him over the last -- since late '95 and have seen, you know, just real strong character similar to what Pastor Roland has described.

Q. Is that the same church that the Pastor testified to?

A. Yes. I'm also a member of the church.

Q. Anything else that you could advise the Court of?

A. I just think that, you know, what's happened in the past and basically Gerry has just shown -- I mean, I would trust him with my kids. I believe at this point in his life that, you know, he's a changed man.

Q. Thank you very much, sir.

MR. WEISS: Nothing further. Just a second. The Prosecutor has a chance.

MS. STIEL: I have no questions for this witness.

MR. WEISS: Does the Court have any questions of the witness?

THE COURT: No. Thank you very much.

MR. WEISS: You may step down, sir. Thank you. Just one more witness, your Honor.

THE COURT: Is Miss Vaughn in the courtroom?

MS. STIEL: Yes, she is.

THE CLERK: You do solemnly swear the testimony you are about to give before this court is the whole truth so help you God?

MS. JOHNSON: I do.

BONNIE JOHNSON

having been called as a witness by the Defense, being first duly sworn by the Clerk, was examined and testified under oath as follows:

THE CLERK: Please be seated in the witness stand.

DIRECT EXAMINATION

BY MR. WEISS:

Q. Would you state your name for the record please?

A. Bonnie Johnson.

Q. And do you know who Mr. Palazzolo is?

A. Yes.

Q. In what contest do you know him?

A. Well, he joined the church with me. He's involved with the music ministry at church and he goes to the Bible study that I go to.

Q. And how often do you go to church with him?

A. Every week.

Q. And are you able to relate to the Court anything about Mr. Palazzolo that you think would be relevant here today?

A. Just that I -- I'm nervous.

Q. Just take a breath.

A. He's -- to me, he's an inspiration. He's very dedicated to church and he's helped me through little things here and there and he's very strong in what he believes and --

MR. WEISS: Thank you, ma'am. Nothing further.

MS. STIEL: Your Honor, I have no questions for this witness.

MR. WEISS: Does the Court have any questions?

THE COURT: I have no questions.

MR. WEISS: You are able to step down, ma'am. Thank you. That's the only witness that we have. Thank you, your Honor.

MS. STIEL: With regard to sentencing, your Honor, if you are prepared to proceed to that portion of the hearing today?

THE COURT: Yes.

MS. STIEL: First, I'll again place the Defendant on notice that we may be appealing the legal ruling on the

corpus delicti rule. I know I did that at the plea and I wanted to do it again today.

With respect to presentence report, it is for the most part factually accurate.

More importantly, with respect to the hearing that was just conducted, I would imagine it's probably very difficult for Shelly Vaughn, the mother of the victims to sit in court and listen to the witnesses who will come in to tell you about what a wonderful person the Defendant has become since he was charged with these offenses.

I guess similarly the People could have brought in a parade of people to tell you how wonderful the victims are or what they do to help other people, what their religious belief or affiliations are but when it comes right down to it, your Honor, all of his actions and all of the testimony that you've heard from that witness stand have to do with what this Defendant did after he was charged with First Degree Criminal Sexual Conduct, an offense that carries punishment of up to life in prison.

He sought counseling in December of '95. This offense occurred in July of '95. Six months later he sought the counseling and it was only after he was charged and a prelim exam was conducted that he sought the counseling that you heard about.

So I think that there's really some question as to how much motivation he had with respect to his apparent problem; how much of it is was due to a realization of his

own that he has such problem or how much of it was, as often is the case when somebody is charged with an offense, they take actions to try to make themselves look better to the Court when time for sentencing does eventually come around.

I would ask you to take that testimony that you've heard into consideration and put it in the proper light really for what it's offered.

There's really not much to consider with respect to that testimony. It has very limited bearing, I think, in relevance with respect to the decision your Honor must make today about sentencing.

Towards that end, regarding the sentencing guidelines, the Probation Department has calculated them to recommend a minimum sentence of anywhere between 24 and 60 months.

The Cobbs Agreement is for a sentence anywhere between zero to 36 months. I believe that the Probation Department has accurately calculated the sentencing guidelines in this particular matter.

I don't -- I don't believe that there would be any dispute with respect toe the offense variable 6 as two or more victims -- as indicated in the police report and the police report was, by the way, stipulated to by the Defendant as a factual basis at the time he entered his plea.

The police report indicates that there were actually two victims of this abuse on behalf of the Defendant; Laura, age 14 and Lisa, age 12.

There's also a third daughter, Ashley, age 8 who was in the home at time the abuse occurred. As a result, I believe that the offense variable 6 is correct when scored at 10 points.

THE COURT: I want to talk about offense variable 7.

MS. STIEL: I am sorry?

THE COURT: Talk about 7.

MS. STIEL: With respect to 7, your Honor, 15 points for the exploitation of the victims due to either the difference in age or the position of authority. This Defendant was their stepfather and in fact had adopted them and they were at his home for visitation when the abuse occurred.

Given that power of authority, position of authority that he had over girls and the shear differences in their ages, the victim charged in this case was 12 years old at the time this abuse occurred.

As a result, I believe 15 points is very clearly properly scored.

As to offense variable 12, with respect to the issue of penetration, I acknowledge that this Court did rule that because that due to the corpus delicti rule, the fact that this Defendant admitted to penetrating the vagina of Laura on

two occasions could not be used in establishing a charge of First Degree Criminal Sexual Conduct, I still believe that that is relevant and proper information for the Court to consider when imposing sentence.

I would ask that you score offense variable 12 to 25 points as has the Probation Department.

And finally, with respect to offense variable 13, psychological injury, the girls did seek counseling after the offense occurred and I would ask that you take that into consideration. I believe that that does substantiate the score on offense variable 13 as indicated.

That does place the Defendant at A-4 and that does recommend a minimum sentence of 24 to 60 months.

The Probation Department is recommending just one year in the Oakland County Jail. That is a deviation from the sentencing guidelines as they have calculated them. I would ask you not to depart as there are no objective or verifiable reasons for departure.

As I indicated earlier, that this Defendant stipulated to the police report as a factual basis. In that police report you will recall that the girls complained that the Defendant invaded their privacy; that he was looking at Laura, age 14, under blankets at night with a flashlight as she slept. The Defendant admitted to this when interviewed by the police.

Laura also told the police that the Defendant would offer to leave the door in the bathroom ajar and; that on one

occasion she saw him in there nude and he was looking at her smiling.

He also admitted that he touched her vaginal area two different times with two different fingers as she slept while at his house for visitation.

The Defendant clearly abused the trust that they had in him in an unspeakable manner. The girls will have to deal with this for their entire life.

Now the Defendant has paraded some witnesses before you to try and impress you with the fact that he's taken steps to rehabilitate himself.

The girls are not here, however, but Shelly Vaughn is, their mother. And Miss Vaughn and I have discussed this and she made a conscious decision not to bring the girls to court to testify as to the damaging effect this has had on her daughters and she did so in, she thinks, her daughter's best interests.

She's trying to help the girls put this incident behind them and she felt that to have to come to court and see this man again and talk about the abuse, damage that they endured at his hands would really hurt any progress that they have made since the abuse occurred.

And I ask you to trust her judgment on that matter as she knows the girls better than anyone.

I would indicate to the Court that the Defendant may have impressed the witnesses that he brought here and also

the Probation Department and others with his apparent remorse for the offense that he committed.

But it would suggest that the true way that you can measure an individual's remorse is the way that they treat their victims after the crime has occurred and it's towards that end that I would ask the Court to consider.

Throughout all of this while I have been a participant in the case, as I inherited it through the Prosecutor's Office an I know predecessors in my office who have handled it previously, Shelly Vaughn has always expressed to us her one main concern in this case. It's not revenge or anything like that, but one thing she did ask for on behalf of her daughters is that the Defendant would agree that the girls can change their names from Palazzolo to her name of Vaughn. They now legally carry the name of Palazzolo because the Defendant did adopt them before the parties were divorced.

In April of 1996 Shelly Vaughn sent this Defendant a letter with a Petition that has to be filed in Probate Court for a name change asking him to just sign a consent that the girls could at least change their name and not have to carry his last name as theirs as the remainder of the abuse.

The Defendant never responded to her request and until March 31st of this year, the law use to be that you either had to have the Defendant's consent or an order terminating parental rights before a minor could change their name.

Fortunately, that is no longer the case but I would submit that simple common decency and concern and compassion for the victims in this case would have at least allowed them to that minor concession, to allow the girls to change their name back to one of Vaughn rather than having to carry his.

He did not demonstrate any such common decency. And again, I received a call indicating that just a couple weeks ago that the Defendant would be willing to concede to the name change of Palazzolo so long as the victims did not stand up and ask for an exorbitant or harsh sentence in this case, I would submit as a way of extorting a leniency -- a leniency or a position of leniency from us.

This, you Honor, I think reflects the Defendant's lack of remorse and concern and compassion for the victims that he could not make that one common act of decency in order to stipulate that they don't have to carry his last name.

Also a lack of remorse is reflected in the presentence report which indicates that he has an arrearage of $3,607.92 with respect to child support.

Although the presentence report indicates that he has been making payments to try and catch up on arrearages, he's only making a payment of $10.00 a month towards that amount.

In conclusion, your Honor, I ask that you sentence the Defendant within the guidelines as scored by the

Probation Department; that you impose the maximum term of incarceration under the Cobbs Agreement which is three years; that you deny work release because he is ineligible as a sex offender and that you order restitution in the amount of $3,607.92.

THE COURT: Counsel, let me ask you a question as to a couple of those matters. Is it appropriate for this Court to order restitution on the child support arrearage --

MS. STIEL: Well --

THE COURT: -- in a criminal matter?

MS. STIEL: I know it's a novel issue but I would indicate to the Court that it's no different than in a malicious destruction of property case where there's restitution to be paid and the victim also has a civil judgment. I don't think -- I think that you can order it as a term of restitution in this case and enforce it just as you could order restitution in a malicious destruction of property.

THE COURT: I would disagree with that. If he is in arrearage, I am equally as tough with my child support arrearages as I am with my criminal matters and I think that I am beginning to get that reputation out to the community. If he's got an arrearage, then you can certainly let Miss Vaughn know she can bring it up before this Court and we'll deal with it then.

You are asking me not to follow the probation report recommendation?

MS. STIEL: That's correct. I am asking you to impose a minimum sentence of three years. That is within the original Cobbs Agreement of zero to 36 months.

And finally, you Honor, just as a final note, if you're not inclined to order the amount of restitution that I've requested, I still submit that it does reflect on his part a lack of remorse and concern for the victims as he's attempted to portray through all of these proceedings.

THE COURT: Thank you. Mr. Weiss?

MR. WEISS: Thank you. Just a couple of matters.

THE COURT: You want to talk about the scoring first?

MR. WEISS: Yes.

My recollection was at the time of the plea that the Court indicated it would stay within the guidelines and Court -- the Court asked myself and Miss Stiel what the guidelines were.

I indicated my calculations was zero to 36. Miss Stiel indicated, and I believe a transcript of those proceedings would so verify, that she in fact agreed that those were in fact the guideline calculations. I think that herself and her office are now precluded from arguing anything different.

THE COURT: Where would you think the difference comes in on the scoring --

MR. WEISS: I think --

THE COURT: You always have to let me finish my sentence.

MR. WEISS: I apologize.

THE COURT: What do you think the differences are on this scoring?

MR. WEISS: OV-6, 12 -- 6 and 12 and 7.

THE COURT: Those would be the only ones then.

MR. WEISS: Well, 13 -- in talking to Miss Stiel before we proffered the plea, my recollection was that there was some discussion about serious psychological injury.

THE COURT: So let's talk about it this way: What do you find -- all right. I think 6 is scored correctly.

Go on to 7.

MR. WEISS: Can I just make my argument for the record?

THE COURT: If you could. We have been arguing at this almost an hour now, so.

MR. WEISS: I believe there's but one victim in this case. The Court has suppressed the statement and even though the police report was utilized for the plea, I think my statement was for plea purposes only, nothing regarding sentencing. There was but one count in this Complaint, but one victim.

7. I think it's clear that this occurred -- the advantage was not because of age or familial relationship in the sense of a person being awake and a person approaching that awake person and coming to them in that regard.

It's clear that if an advantage was taken, it was because the person was asleep. That is consistent in all the statements and all the testimony. It is also consistent, I believe, in terms of Miss Stiel representing to the Court at the time of the plea that 5 is the appropriate point assessment being asleep rather than some other status boot-strapping it up to 17.

In terms of 12, I don't believe there's a penetration as it relates to the current offense. The court has suppressed statements so I think 25 -- the 25 assessment goes out the window.

In terms of OV-13, I can see serious psychological injury, although there's been on testimony, nothing to indicate -- I believe the presentence report indicated the girls went for an evaluation once and never went back.

So I think a proper assessment would be zero, although if you're going to have an assessment of zero to 36, the 5 there and the 5 in OV-7 would give 10 which would give rise to the zero to 36 which is what both Counsel talked about at the time of the plea.

And therefore, I submit that their office is bound by it and I would respectfully submit the Court should exercise its discretion.

THE COURT: I want to talk about the victims again. You're arguing there's only one --

MR. WEISS: Victim.

THE COURT: -- victim that's been named?

MS. STIEL: That's correct. There was only -- I would submit in the spirit of restraint -- prosecutorial restraint, only one victim charged in this case although the sentencing guidelines provides, the specific language of that variable provides that you count each person who was placed in danger of injury of loss of life as a victim; placed in danger of injury because of the Defendant's conduct and by his own admission, your Honor, there were three girls in that home, all of them in risk of danger of the Defendant's abusive conduct; two of them he actually took steps of abuse towards.

THE COURT: But I guess I'm concerned, Counsel, because at one point, before we took this plea, I did ask what the guidelines were and there was an agreement by both of you that it was zero to 36.

MR. WEISS: That's true, your Honor, and I submit that I made a mistake in the calculation of the guidelines and I'm in agreement with the Probation Department's calculation of them now.

But the Cobbs agreement was only that you would impose a sentence within the guidelines of zero to 36 months. That's what the Defendant entered his plea on, on that basis knowing he could receive a sentence of up to 36 months and so my erroneous calculation does not in any way place in cement the correct scoring of the variables on this particular case.

THE COURT: Anything further?

MR. WEISS: From me, your Honor?

THE COURT: Yes.

MR. WEISS: Just a couple.

First of al, Miss Stiel again attempts to preserve any appellate rights from the Court's decision. She did that at the time of the plea. I objected then. Unless the Court wants me to reiterate the bases of my objection, I will not.

THE COURT: You can just incorporate them.

MR. WEISS: Thank you very much, your Honor, and I do so.

As it relates to this issue of child support, I believe Judge Gilbert has the child support matter. I believe Judge Gilbert, in exercising her discretion has determined what the arrearage would be and that's being dealt with and even the Probation Department indicates that he is not in violation of the Court's current order regarding that.

As it relates to the name change, I take real umbrage at that and I beg the Court's indulgence in allowing me to address it for a second.

Mr. Palazzolo back in the spring of '96 did present me with what was sent to him --

THE COURT: Do you really need to go into this?

MR. WEISS: Only if the Court is going to buy into that argument.

THE COURT: No, I frankly don't -- no, I will not.

MR. WEISS: Then I won't go into it either.

THE COURT: All right.

MR. WEISS: Lastly, I don't minimize what transpired in this case. I don't minimize what Mr. Palazzolo did. My recollection was when we were in law school there were a number of bases for sentencing. One of the prominent ones was rehabilitation, another one was retribution.

The reason that I put those individuals on the stand is, is because there is nothing, with all due respect to the Court or I or Mr. Palazzolo or Miss Stiel or anyone else can do to change what happened in the summer of 1995. I don't mean that in a flippant way. I mean that in a very serious way.

I brought these people and I asked Mr. Palazzolo to bring them and again, I apologize for indulging Court but I wanted the Court to know what Mr. Palazzolo has done with his life even before the preliminary examination, with all due respect to Miss Stiel, in terms of getting some treatment.

The rest I will leave to Mr. Palazzolo. The Court does not sentence in a vacuum. The Court does take into account retribution. The Court does take into account rehabilitation and I beg the Court's indulgence and I think that the analysis given by the Probation Department in terms of probation, they asked for one year incarceration, first 6 months eligibility for work release.

Now the Sheriff's Department won't do that by their own administrative rules, but I think that's indicative of the

fact that at least the Probation Department deemed him a candidate to allow him to go out into the public even if it's only for 10 or 12 hours a day, 6 days a week and then the rest to be on electronic monitoring.

I would ask the Court to accept that recommendation but because he can't be allowed into work release, to allow the electronic monitoring to go for the full year.

Thank you. And I would like Mr. Palazzolo to be given a moment to address the Court.

THE COURT: Does Miss Vaughn want to address the Court today, Miss Stiel?

MS. VAUGHN: No.

MS. STIEL: No, your Honor.

THE COURT: Mr. Palazzolo, would like to address the Court?

DEFENDANT: Yes, I would, your Honor. I'm not here to make any excuses. I did what I did and it was wrong and I hurt innocent people, not just my children but my ex-wife and her family and my family and other close friends and people that know me. And there's far reaching repercussions when you do something like what I have done but I also know that I have made major steps in my life and I had to do three things to do that.

I had to accept responsibility for what I did, confess what I did, which I think I have, and then had to repent and change my ways and turn away from those sinful things that

I have done and then I had to be accountable for my actions and that's why these four people are here today.

I have got a lot of people who know what I have done and I asked them personally to hold me accountable and that helps me to stay in line and put my nose to the grindstone because I know what I need to do.

As far as my children, I haven't seen them in two years and I miss them very much. And I was ordered not to have any contact with them and I have to abide by that. But it's hard enough to know what they're feeling, if they're having trouble in school, if they are getting along with their peers, if they are having trouble sleeping at night, if they think -- they blame themselves for what I did. They didn't do anything. I am the one who hurt them and I wonder if they feel I got daddy into trouble. They didn't do anything wrong. I am the one that caused the crime. It's my responsibility and I am accountable, but I want to -- I want to make restitutions to them. I want to hopefully some day have a -- reconcile. I had to reconcile for me to Christ who's my Savior to put me back in line and I want to -- if I can reconcile with him and he can forgive me, and I know that I am forgiven for what I have done in his eyes, I want to be able to witness to my kids and give them the chance. It's up to them if they want to forgive me or not. It's up to my ex-wife if she wants to forgive me or not. I can't control that.

But I want a chance to make amends, your Honor, and I can't do that if I am behind bars and I lose my job and I can't support them or do anything, and I need to do that.

What I have done was wrong. I hurt people and I have lived with that but I know that I have been forgiven. I don't have to carry the burden anymore.

I am not in bondage anymore because I have given it up. I have changed my ways. And if that's possible, I can be forgiven by God, anything is possible. I believe truly that anything can change and I believe my kids can heal.

I don't believe in the fact that their life is going to go on and they are going to be -- they need help. I want to see them get help and I am willing to pay for that help, whatever it takes because it's my responsibility and I am their parent, even though I have abused that right. I want that fact -- I want to be able to make amends to them and I am willing to do that.

So I ask you and I beg the Court for mercy, give me the change to do that. Thank you.

I'm sorry to you, Shelly. I have hurt you, but you can't live in bondage and I hope that the day comes when you can forgive me, not for my sake, but for your sake because I still care and I always will.

THE COURT: Mr. Weiss, as a preliminary matter, were there any other corrections or objections to the

presentencing report and that you and your client have had an opportunity to review that report?

MR. WEISS: My client and I have reviewed the report. In terms of the factual biographical information of Mr. Palazzolò, there are no objections. I believe I have placed my scoring objections on the record and I don't have anything additional to add unless the Court has any specific questions of Counsel.

THE COURT: The only correction I would make is that by my reading of the guidelines, I would score OV-7 as a 5 and not at 15 making this a score of 45, making it 83, making it a guideline range from 24 to 48 months.

Mr. Palazzolo, I have spent an hour now listening to your testimony, the people who you have brought and I will be honest and frank with you as I think you have tried to be here today.

If this is what it took to make you, for lack of a better term, see the error of your ways, that's fine. That's only part of what the justice system and the judicial system is all about.

Part of my job is not only to look at the Defendants, but to understand what's happening with the victims and the victims family in this case.

Miss Vaughn chose not to speak today. I think the Prosecutor spoke on her behalf. That's at least a lot of what I heard. So therein lies what I am balancing.

I do recognize that you don't have any other prior criminal record. I do recognize that since the occurrences, the crimes have been committed that you have tried to do something much more positive. You have a number of people that are willing to speak on your behalf and I think that's outstanding and I hopefully will never see you again. But the crimes were committed and not only were people affected but children were affected and that's totally unfair to them.

They are the most innocent that you could ever have as victims, children who were sleeping.

Based on all that, and the Court recognizing its discretion in these matters, I have reviewed the presentence report investigation, I have listened to all the testimony here today, listened to the arguments and the Court does sentence you as follows, Mr. Palazzolo:

3 years probation, 1 year in jail, one day credit, balance of jail sentence suspended after 6 months in order to enter the electronic monitoring program; Court costs of $750; attorney's fees to be determined; crime victim's fee -- are you retained?

MR. WEISS: Yes, I am.

THE COURT: No attorneys fees. Crime victim's fee of $60, supervision fee of $1,080 at $30.00 a month; a forensic fee of $150; community service program fee.

MR. WEISS: Does he still pay for probation oversight fee while he's incarcerated?

THE COURT: I don't know the logistics of that.

Mr. Palazzolo, you will participate in electronic monitoring as directed by the Probation Department for a period of 6 months and comply with program rules; you shall submit to HIV testing and comply with sex offender registration requirements.

You shall maintain employment or seek employment as directed by the Probation Department. You will participate, as directed by the Probation Department in a mental health treatment program.

I think this should go without saying right now, but it's this Court's order that you shall not contact or be in the company of your step-children, the victims in this matter.

You have 42 days to effectuate an appeal. If you cannot afford an attorney, one will be appointed for you.

Counsel, could you please acknowledge receipt of the appellate's rights form?

MS. STIEL: For the record, your Honor, we acknowledge receipt of the form.

THE COURT: Good luck, Mr. Palazzolo.

MS. STIEL: Your Honor, just so the record is clear, I understand the Court's scoring of the guidelines and I thought you had said that you thought that the guideline range was 24 to 48 and I believe under the guidelines as you calculated them.

THE COURT: 12 to 48.

MS. STIEL: 12 to 48.

THE COURT: 12 to 48.
MS. STIEL: Thank you, your Honor.
THE COURT: So it's within guidelines lines.
MS. STIEL: Thank you.
(Hearing concluded)

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* *

STATE OF MICHIGAN)
) SS
COUNTY OF OAKLAND)

I, Kathleen A. Milam, Certified Shorthand Reporter, certify that this transcript consisting of 47 pages, is a complete, true and accurate transcript of the proceedings and testimony taken in this case on July 23, 1997.

/s/ Kathleen A. Milam
Kathleen A. Milam CSR-1088
1200 N. Telegraph Rd.
Pontiac, Michigan

Dated: September 10, 1997

STATE OF MICHIGAN CIRCUIT COURT
FOR THE
COUNTY OF OAKLAND
SIXTH JUDICIAL CIRCUIT

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff,

CASE NO. 95-005800-FY-2

VS.

GERALD JOSEPH PALAZZOLO,
Defendant.

PRELIMINARY EXAMINATION

BEFORE THE HON. WILLIAM E. BOLLE, JUDGE
Troy, Michigan - Monday, January 8, 1996
Monday, January 29, 1996

APPEARANCES

KAREN URBIN, Assistant Prosecuting Attorney
appearing for the People
ANDREA DEAN, Assistant Prosecuting Attorney
appearing for the People
ARTHUR WEISS, Attorney at Law
appearing for the Defendant

JANICE AIRD - CERO8O2
Official Court Recorder
February 8, 1996

INDEX

DATE/WITNESS:	Page
Monday, January 8, 1996	4
LISA RENE PALAZZOLO	
Direct Examination by Ms. Urbin	9
Cross-Examination by Mr. Weiss	23
Redirect Examination by Ms. Urbin	28
Monday, January 29, 1998	36
Decision of the Court	36

EXHIBITS:	MARKED	RECEIVED
PX #1 - typed report	32	32
PX #2 - handwritten report	32	32

STATE OF MICHIGAN
IN THE 52/4 DISTRICT COURT
FOR THE
COUNTY OF OAKLAND

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Troy, Michigan
Monday, January 8, 1996 - 9:43 am.

MS. URBIN: Good morning, your Honor, Karen Urbin appearing on behalf of the People, calling People vs. Gerald Joseph Palazzolo, case number 95-005800-FY.

MR. WEISS: Good morning, your Honor, may it please the Court, Arthur Weiss on behalf of Mr. Palazzolo.

MS. URBIN: Your Honor, today's the date and time set for preliminary examination in this case umm... .there is a legal issue that obviously needs to be addressed, on behalf of the defense, prior to commencing with preliminary examination.

It should be noted, for the record, the People are demanding exam in this case.

MR. WEISS: Your Honor, as the prosecutor has indicated, we've had a number of telephonic conversations and a couple of personal conversations regarding this matter.

The allegations pertain to criminal sexual conduct, first degree ah, it is my understanding, on the basis of discovery materials that I have read, as well as conversations with the prosecutor, that ah....if the complainant were to take the stand, she would describe an incident which would either be second....fourth degree or second degree criminal sexual conduct.

It is my understanding that...

COURT RECORDER: Excuse me, would you use one of the microphones...

MR. WEISS: Oh, I apologize...

COURT RECORDER: ... I'm not getting you... thanks.

MR. WEISS: It is further my understanding that to attempt to support the charge of CSC I, that the prosecution would attempt to introduce a confession, given by the defendant to the authorities.

Umm, in discussing it with the prosecutor, it is our position that that attempt to umm, exacerbate the charge to first degree, by use of the confession, would violate the Corpus Delicate Rule.

I'd offered to the prosecutor the opportunity to stipulate to the factual bases, upon which the complainant would testify, and then leave, leave the legal determination to the Court, as Miss Urbin has just indicated to the Court, they are demanding an exam and are not desirous of that.

We're prepared to proceed, the only question that I have of the Court is, insofar as it relates to the legal determination, as to the utilization of the confession, to up the charge to CSC I, whether the Court would be satisfied with merely arguing it today, or whether the Court would like us to brief it.

I think it is a significant issue and because of the significant additional penalties, that the defendant would face ah, even from second to first degree criminal sexual conduct, it is of sig. . . . of important moment to the defense and I'm sure to the prosecution, as well.

MS. URBIN: Your Honor, briefly in response, I'm ready to argue the case today, however if the Court wishes to have a legal memorandum, I can do that. If that is the case, however, I would ask that we at least preserve the testimony of the child in this case today.

She is here, she is ready to testify, the Court is now aware of the nature of the charges in this case. I would also state, for the record, that under MCLA 600.21638 (9), I would move to close the courtroom. Based on her age, umm...her psychological maturity, the nature of the offense and the desire of her and her mother to have the courtroom closed during her testimony.

I think that this is a significant legal issue umm, Mr. Weiss and I obviously disagree on what the law says, but I would ask that, at the very least, that she be allowed to testify today umm, in a closed courtroom. I believe there's no objection to the closed courtroom.

MR. WEISS: Obviously, your Honor, we were trying to avoid the child having to testify, at all, so we're not gonna object to the courtroom being closed.

THE COURT: All right, I think it would be appropriate to take the testimony and I'll reserve any ruling on the legal issue until I see some law, if either a you wishes to submit that.

MR. WEISS: Well again... .and I, I don't mean to, to beg the Question, I'm prepared to argue it orally, but admittedly it is a significant issue, the Court of Appeals has

ah, trampled over the issue quite extensively, the Supreme Court has dealt with it historically ah, quite a bit, of recent vintage not as much umm, and so whether the Court will feel comfortable simply citing cases to the Court and making a ruling, or the Court would like to have it put in written form ah, I'm prepared to proceed on however the Court desires.

THE COURT: Well I don't really care what form the argument takes, whether its oral or in writing, I may want some time to think about it, however.

MR. WEISS: Umm...if the Court doesn't care, one way or the other umm, I would respectfully ask the Court say for one week to file a written memorandum umm...

THE COURT: I've no problem with that, if you simply want to submit some cases, that's okay, but I....without hearing what the issue is, and I guess I have some idea what it is, I probably would want to take a look at it before I call it.

MR. WEISS: Quite frankly historically under the *Corpus delicti* Rule, the law in this jurisdiction has been that until such time as the *corpus delicti* of the offense has been established, independent of anything out of defendant's mouth, that a confession cannot be utilized and the *corpus delicti* has been referred to.. . . or defined as all the elements of the offense.

THE COURT: I understand that. I understand what the basic argument is, but I'm not going to call it this morning.

MR. WEISS: Okay, that's fine.

MS. URBIN: Thank you, your Honor and, with that your Honor, I'd ask that the courtroom be closed for the first witness, who is Lisa Palazzolo, be allowed to testified with her support person, which would be Mary (unintelligible) from the prosecutor's office, she is a social worker.

THE COURT: Any objections to the...

MR. WEISS: No objection...

THE COURT: ... courtroom being closed?

MR. WEISS: ... to the courtroom being closed, your Honor.

THE COURT: All right, well take a few minutes then, I'll ask that everyone who is not connected with this case will have to leave the courtroom then.

MR. WEISS: Thank you.

MS. URBIN: Thank you.

THE CLERK: All rise.

(At 9:47 a.m. Court stands in recess and the courtroom cleared by the clerk)

(At 9:58 a.m. Court reconvened)

MS. URBIN: Your Honor the People are ready to proceed, the first witness would be Lisa...(inaudible)...just stand right there and the Judge will swear you in.

THE COURT: Do you want to raise your right hand, please? Do you swear to tell the truth?

MISS PALAZZOLO: Yes.

THE COURT: Okay, have a seat.

LISA RENE PALAZZOLO

Called at 9:58 a.m. by the People, sworn by the Court, testified:

DIRECT EXAMINATION

BY MS. URBIN:

Would you please tell the Judge your full name? Lisa Rene Palazzolo.

Lisa, you're...

COURT RECORDER: I'm sorry, I can't hear you.

...going to have to speak up.

Lisa Rena Palazzolo.

COURT RECORDER: Thank you.

Q. Lisa, how old are you?

A. Twelve.

Q. When's your birthday?

A. March 25th.

Q. And what grade are you in now?

A. Seventh.

Q. Now... .who do you live with right now?

A. My mom.

Q. And who else?

A. My two sisters.

Q. Do you have older or younger sisters?

A. Both, I got a younger sister and older sister.

Q. What's your older sister's name?

A. Laura.

Q. And how old is she?

A. Thir. . . fourteen.

Q. What's your younger sister's name?

A. Ashley.

Q. How old is Ashley?

A. Nine.

Q. Okay....now, did somebody else used to live with you some years ago?

A. Yes.

Q. And who was that?

A. Jerry.

Q. Okay, is Jerry in the courtroom today?

A. Yes.

A. Could you Just point to him...

MR. WEISS: We'll stipulate to identification, your Honor.

MS. URBIN: Thank you.

THE COURT: Okay.

Q. Now did there ever come a time - - who is Jerry? How's he related to you?

A. He's my stepfather.

Q. Okay and did he adopt you?

A. Yeah.

Q. Did there come a time when you would go and visit with Jerry?

A. Yes.

Q. When you would visit with Jerry, what city would you go an visit him at?

A. Clawson.

Q. When you went to visit him, did you stay in an apartment, house or a trailer, or what?

A. A house.

Q. Could you describe the house? Is it one story or two stories?

A. One.

Q. How many bedrooms does it have?

A. Umm, three.

Q. Who lived at the house besides Jerry?

A. His father.

Q. When you would go there, would you go by yourself or would you go with your sisters?

A. My sisters.

Q. When you would go there would you stay for the day or would you stay over night?

A. I'd stay the whole weekend.

Q. Now If you stay the whole weekend, were there sleeping arrangements that would he made?

A. Yes.

Q. How many bedrooms did you guys, you three girls get to share?

A. One.

Q. Would everybody stay in the same bedroom?

A. No.

Q. How would it work?

A. Umm, we'd have bunk beds and Laura would sleep on the bottom, I'd sleep on the top and Ashley would sleep on the couch in the living room.

Q. Okay. Now, did there come a time that you stopped going over to visit with your stepfather?

A. Yes.

Q. And do you know why you stopped visiting him?

A. Yes.

Q. Okay. Do you know what you're here to talk about in court today?

A. Yes.

Q. Okay. Did there come a time when your stepfather did something that made you feel uncomfortable?

A. Yes.

Q. Did he do more than one thing that made you feel uncomfortable?

A. Yes.

Q. Could you tell the Judge, very briefly, one of the first things that you remember him doing, that made you feel a little uncomfortable?

A. He said that we looked great in bathing suits.

Q. Okay and would he want you to put on your bathing suits?

A. Umm...like to go into a pool and stuff.

Q. Okay, you know I'm gonna ask you to do something, I know you've got a tissue in your hand, when you answer could you take your hand down from your face for me? Thank you. Now did there ever come a time that he would also do something else that made you feel uncomfortable?

A. Yes.

Q. What else would he do?

A. Walk around in his underwear.

Q. Okay, was there anything else that he did that you didn't like?

A. Umm....not really.

Q. Okay. Was there ever a time that you were in your bedroom and something happened that made you feel uncomfortable?

A. Yes.

Q. Okay, could you tell me where you were, you were sleeping the bedroom?

A. On the top bunk.

Q. And where was your sister Laura?

A. On the bottom bunk.

Q. And what happened umm, were you by yourself in the room with your sister, initially, at the...at first?

A. Yes.

Q. Did there come a time when Jerry came in?

A. Yes.

Q. What was his reason for coming in, at first?

A. Laura was havin' a hard time sleeping.

Q. And...

A. ...she was coughing, cause she has asthma.

Q. Okay and when Laura had asthma, did there come a time when Jerry gave her something?

A. Yes.

Q. Do you remember what he gave her?

A. No.

Q. Do you remember what it looked like?

A. It was pills...

MR. WEISS: Excuse me, your Honor, but we're not dealing here with Laura, I don't know....and I don't know what the relevancy is, relative to the medication that was given another child because of her asthmatic condition.

MS. URBIN: Your Honor, what I'm doing is setting the stage for what happened after Laura was given the medication, but I think this witness can testify to what led up to umm, anything that would have happened that made her feel uncomfortable.

THE COURT: I'll overrule the objection. I don't know whether it's relevant or not, but it's a rather innocuous question, go ahead.

Q. And what did it look like that Laura was getting?
A. Pills.
Q. Okay and after Laura got the pills, did Jerry leave the room?
A. No.
Q. What did he do then?
A. He reached under the covers and he touched my privates.
Q. Okay and do you know what the name of that part of your private is?
A. Yes.
Q. What is the name of that?
A. Vagina.
Q. And what did he use to touch you?
A. Index finger and his middle finger.
Q. Okay and did he touch you umm, on that night, one time or more than one time?
A. Umm...one time.
Q. Okay. And do you know how long it lasted?
A. About twenty seconds.
Q. Okay and was there something that - - strike that - - what did you do after that twenty seconds?
A. I rolled over.

Q. And when you rolled over what did Jerry do with his two fingers?

A. He took his hand out of the covers and he left the room.

Q. Now when, when Jerry touched you umm... did you have clothes on or clothes off?

A. Clothes on.

Q. And ah, what kind of clothes did you have on?

A. I had underwear a bra and a T shirt.

Q. Okay. And when you said he touched your vaginal area, with the two fingers, what ah, was it over or under your underwear?

A. Over.

Q. After Jerry left the room, did you do anything?

A. Yes.

Q. What did you do?

A. I got off my bunk bed and went down to wake up Laura and I told her what happened...

Q. Okay.

A. ...and she said I know...

Q. We'll...

A. ... I saw him.

Q. Okay, now after...

MR. WEISS: I'm gonna object as to that, your Honor.

MS. URBIN: I would agree, your Honor with respect to.

THE COURT: Yes, I'll sustain that objection.

MR. WEISS: And ask that it be stricken.

THE COURT: Yes.

MS. URBIN: Umm...and that, the stricken part would only be the comment made by the sister is that correct?

THE COURT: Yes, that's...

MS. URBIN: Thank you.

THE COURT: ...hearsay.

Q. After you talked to your sister, did you tell anybody else?

A. Yes.

Q. Umm, and who did you tell?

A. My mom.

Q. Did you have to - - strike that - - did you tell your mom one time, or did you tell your mom more than one time?

A. More than once.

Q. Okay. And do you remember how many times, totally, Jerry touched you?

A. One time.

Q. Okay, do you remember talking to the police officer, Detective Hayes, who's in court today?

A. Yes.

Q. Okay and when you talked to him was your memory better then than it is today about what happened?

MR. WEISS: I'm gonna object, your Honor, if we're going to try to impeach, I'm looking at the statement and this was the only time this happened to her, that was the... .at least that's in the (inaudible), the narrative report that I have, so I'm gonna object at any attempt to indicate anything to the contrary.

MS. URBIN: Your Honor, I'm....was it the - - I think I can clarify the question.

THE COURT: Okay, go ahead.

Q. Umm, how many times did he touch you that night?

A. Once.

Q. Okay, do you remember talking to Detective Hayes about how many times he touched you that night?

MR. WEISS: Again, your Honor, it's the same type of thing, this was the only time this happened to her.

THE COURT: I don't know that.

MR. WEISS: But this is what....I mean if she's trying to impeach, she asked him (sic) about... she asked the witness about talking to the detective, this is the detective's report, its not that it only happened to her one time that night, the statement is this was the only time this happened to her.

We have a young child here, the prosecutor is attempting to suggest to her that she told something different to the detective and the statement is typed and the copy that I have, from discovery, this was only time this happened to her, and I object in trying to suggest to this witness that she told the detective something else, when that's what the detective put down, consistent with the testimony, this was the only time this happened to her.

MS. URBIN: Your Honor, line two, which is not what Mr. Weiss is reading, says something different.

THE COURT: I'll overrule the objection, go ahead.

MS. URBIN: Thank you.

Q. Do you remember telling Detective Hayes that umm, Jerry touched your vagina twice, with two fingers, and then you rolled over?

A. Yes.

Q. Okay, is that true?

A. Yes.

Q. Okay.

A. It happened once, but he touched me twice.

Q. Okay, I guess that's....it, it....when you say it happened once, okay, could you explain what you mean by that, it happened once but he touched you twice? Tell the Judge what you mean by that?

A. Like it happened once, that I remember, the rest of the time I was sleeping, I guess.

Q. Okay, but what we...

MR. WEISS: I'm gonna object as to some speculation, your Honor, and ask that it be stricken. What you said was...

THE COURT: Yes.

MS. URBIN: I agree, your Honor.

Q. Lisa, what you said was that he, he touched you only one time....that it...

MR. WEISS: It...only happened once, but...

MR. WEISS: This is leading, your Honor, I would object.

MS. URBIN: I'll rephrase the...

THE COURT: This is a matter of semantics...

MS. URBIN: Yes.

THE COURT: ...is it not?

MS URBIN: It is, your Honor, what...what I'm getting at is that...

THE COURT: Are we going to argue about semantics now?

MS. URBIN: Your Honor the, the issue in this case obviously, in the second degree, is intent and what she has indicated is that he touched her twice that night, but it only

happened one eight and, if that testimony is clear for the record, then I have no further questions.

THE COURT: Well I don't know what's clear, it sounds to me like it's a matter of semantics, are we talking about one time, are we talking about one date?

MS. URBIN: One date.

THE COURT: Okay....fine.

Q. Would you tell me what you mean when you say he touched you one time....one....one incident, but it hap...but he touch you twice? What do you mean by that?

A. Like there was like the same time he touched me but he went like that and then he lifted his fingers and went like that that's what I mean.

MS. URBIN: And let the record reflect the witness has, has touched one part and then moved approximately one inch on her knee.

THE COURT: Okay...yes.

MS. URBIN: I have nothing further then, at this point.

THE COURT: Mr. Weiss, do you wish to...

MR. WEISS: Thank you, your Honor, just a couple of questions.

BY MR. WEISS:

Q. Lisa, do you recall when this happened?

A. About early June.

Q. Okay, and were you awake when your father, or Jerry came into the room?

A. Yes.

Q. Okay and you remained awake and conscious until he left the room, correct?

A. Yes.

Q. All right. And in terms of his contact with you, you've related the entire episode in response to the prosecutor's questioning?

A. I don't get that.

Q. You related.... you told us about everything that happened...

A. Yes.

Q. ...correct? Okay. How many people have you discussed this with?

A. I think....at home or here?

Q. Wherever?

A. About five...

Q. Five different people?

A. (nods head yes)

Q. Okay and that's a shaking of the head yes?

A. Yes.

Q. Okay. Just so you understand, the woman sitting next to you is recording this and she can't take down a, a head shake, she has, she can only take down verbal responses, okay?

A. Okay.

Q. Umm, could you tell us who these five people were....or are?

A. Detective Hayes umm, her...my mom...

Q. When you say....your mom, okay....and then you pointed to woman in the back?

A. No, her.

Q. The woman sitting here?

A. Yes.

Q. Ms. Urbin?

A. (nods head yes)

Q. Okay, anyone else?

A. Umm...

Q. Have you discussed it with the woman here in the back, in the black coat?

A. Not the whole thing but I told her about what was happening here.

Q. Okay and do you know what her name is?

A. Mary Kay.

Q. Okay, anyone else?

A. That's all I can remember.

Q. Okay.

MR. WEISS: Just one moment, your Honor...

Q. Now have ah, have any of these people that you discussed this case with umm, told you about what Jerry's position is regarding this?

MS. URBIN: Objection, calls for hearsay response.

MR. WEISS: No, just whether she was advised of it, I'm not asking what she was advised of, that's a factual matter.

THE COURT: I guess she can answer the question, yes.

MR. WEISS: Thank you.

THE WITNESS: I don't really understand the question.

Q. I'm sorry, I couldn't hear what you said?
A. I didn't really understand the question.
Q. You didn't understand the question, okay. Umm...has any of the people, that you've discussed this with, told you what Jerry had to say about it?
A. No.
Q. Okay. Have they talked to you about what charges Jerry is facing?
A. Sort of.
Q. Okay and ah, what do you mean by sort of?
A. Like...they told me that...

MS. URBIN: Well, your Honor, that's calling for hearsay...

MR. WEISS: No, it's not coming in for the truth, your Honor, its coming in as to her state of mind.

THE COURT: The question is has anyone told her...

MR. WEISS: What the charges...

THE COURT: ...what the charges are?

MR. WEISS: Yes.

THE COURT: How is that really relevant?

MR. WEISS: Well because I, I got the impression, during the course of....of the, of the witness testimony, that she has been told certain things and ah, I just like to discover where the demarcation ends between what she was told and what she recalls.

THE COURT: All right, I suppose she can answer that question ah...

MR. WEISS: Thank you, your Honor.

THE COURT: ...if she can.

THE WITNESS: Can you repeat it, please?

Q. Sure. Umm...what is it that you've been told regarding what Jerry's charged with?

A. That he might be charged with child molestation.

Q. Anything more specific?

A. No...just...sexually molesting me and Laura.

Q. Okay, anything more specific?

A. Umm...no.

Q. Pardon?

A. No.

Q. Okay.

(Whereupon a conference, defense counsel and the defendant, off the record)

MR. WEISS: Just one moment, your Honor. Nothing further, thank you, your Honor.

MS. URBIN: Just a couple questions, your Honor.

THE COURT: Go ahead.

REDIRECT EXAMINATION

BY MS. URBIN:

Q. Lisa, you said this happened in June, what year?

A. Umm...this year.

Q. If this is 1996, in...

A. Oh, it's...

Q. ...and June hasn't happened yet?

A. ...next year...it's next year...

MR. WEISS: You mean last year?

THE WITNESS: Last year, yeah.

MS. URBIN: Okay.

Q. Now you told the other attorney that you talked to some people and you mentioned 'em by name, did you also talk to your sisters?

A. Yes.

Q. And did you talk to them about what happened?

A. I didn't talk to my little sister because I knew she couldn't understand.

Q. Okay, did you talk to your older sister, Laura, then?

A. Yes.

Q. Okay. Now umm, this other lady in the courtroom, Mary Kay did you talk about the facts of the case or did you talk about the court?

A. The court.

MS. URBIN: Nothing further.

MR. WEISS: No re-cross.

THE COURT: Okay, you can step down.

MS. URBIN: Thank you.

(At 10:15 a.m. witness excused by the Court)

MS. URBIN: Your Honor, I'd ask (inaudible) be excused?

THE COURT: Sure.

MS. URBIN: Your Honor, the other testimony, that I would offer in this case, would be that Detective Hayes, but it is based on the legal argument that we discussed earlier, with respect to the corpus issue.

Does the Court wish to have us brief the issue?

THE COURT: Well do I need to hear what Detective...

MR. WEISS: Well I....

THE COURT: ...Hayes said?

MR. WEISS: ...I ah, I don't have a problem ah....and I don't know if the prosecutor really needs the detective to testify in order to preserve his testimony, such as we had to do with ah, with the young girl.

I don't have a problem, and without waiving my argument, of simply having the typed statement marked as an exhibit and conditionally offered and then leaving it up to the Court, as to whether it will receive it. That, that to me would seem to be the, the quickest and, and shortest way that...

THE COURT: All right, is there any question as to the voluntariness of the statement?

MS. URBIN: I don't...

MR. WEISS: I'm not...

MS. URBIN: ...believe so...

MR. WEISS: ...gonna make that argument...

MS. URBIN: ...at this...

MR. WEISS: ...at this proceeding. However, I would hate for the Court to ask me if I am effectively irrevocably abandoning that, or waiving it, at any time. Ah....I would simply, at this juncture, if the Court would

allow me, simply to contend that the statement should not be utilized to bootstrap what the young girl have said, from the criminality that would arise from that, to the charges contained in the Complaint and Warrant.

So I guess I would like to be able to reserve umm, whether I ever raise it or not, is problematic, but at this juncture I'd hate to...to be required to waive umm....voluntarinees or, or any fifth....or amendment concerns.

I would simply like ah, if the Court would allow me to argue that the statement should not be utilized in violation of the *Corpus delicti* Rule because with all due respect to the young girl, I don't believe that she has made out a CSC I and, therefore, I would like to be able to argue legally that the statement should not utilized ah, to do that.

MS. URBIN: Your Honor, I believe there are two statements and, at this juncture, for purposes of preliminary examination, I have no objection to admitting both of the type written statement, of Detective Hayes, for purposes of the argument, and the handwritten statement, signed by the defendant and witnessed by Detective Hayes.

THE COURT: Shall we have them marked as exhibits then?

MR. WEISS: No problem if they be marked as say one or two or...A and B, however the Court wants...

THE COURT: One and two.

MR. WEISS: And umm...

THE COURT: One will be the...

MS. URBIN: The type written...

THE COURT: ...type written statement

MS. URBIN: ...statement.

THE COURT: And exhibit two will be 1 handwritten...

MS. URBIN: The hand...

THE COURT: ...statement.

(At 10:20 am. PPX #1 and PPX #2 marked by the Court Recorder)

MR. WEISS: And I, I....I think it's fair to say that if, in fact, the statements were admitted umm, and the Court considered them, then it would bootstrap the accusation to CSC I and all i'm contending is, at this Juncture (inaudible)...

THE COURT: I understand...

COURT RECORDER: Would you get by a microphone, Mr. Weiss?

THE COURT: Mr. Weiss, I understand your argument, you don't need to keep repeating it.

MR. WEISS: Okay.

THE COURT: All right, I will receive exhibits one and two....and, Mr. Weiss, how much time do you want to present whatever you want to present to the Court?

MR. WEISS: If I could say submit my ah.... legal...or my written memorandum, say a week from today

umm....and ah, if the prosecutor would want to do so we could file them simultaneously umm....perhaps then have another week to file any response to that and, if the Court would want to rehear this matter say in, in two weeks, or so umm....if that's a reasonable period of time for the People and the Court.

THE COURT: It doesn't really matter me, two weeks, three weeks?

MR. WEISS: If we, if we could have a week...

THE COURT: Does it matter to you, Ms. Urbin?

MR. WEISS: ...then a week to respond and then the Court could have an additional week to, to review...

THE COURT: That's probably better.

MR. WEISS: ...everything.

THE COURT: How about setting it for decision three weeks from today, which is January 29th?

MR. WEISS: That's fine, your Honor. Would the Court umm....'cause I know the Courts docket, could we schedule it say later in the morning?

THE COURT: Yes, that probably would better, how about eleven o'clock?

MR. WEISS: Eleven o'clock is fine, your Honor.

THE COURT: Okay, we'll...

MS. URBIN: Thank you, your Honor...

THE COURT: ...see you back here then at that time.

MR. WEISS: Thank you very much, your Honor.

MS. URBIN: If I may approach your court reporter?

THE COURT: Yes.

* * *

STATE OF MICHIGAN CIRCUIT COURT
FOR THE
COUNTY OF OAKLAND
SIXTH JUDICIAL CIRCUIT

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff,

CASE NO. 95-005800-FY-2

vs.

GERALD JOSEPH PALAZZOLO,
Defendant.

PRELIMINARY EXAMINATION - CONT.

BEFORE THE HON. WILLIAM E. BOLLE, JUDGE
Troy, Michigan
Monday, January 29, 1996

APPEARANCES

ANDREA DEAN, Assistant Prosecuting Attorney
appearing for the People
ARTHUR WEISS, Attorney at Law
appearing for the Defendant

JANICE AIRD - CERO8O2

Troy, Michigan

Monday, January 29, 1996 - 11:23 a.m.

MS. DEAN: Good morning, your Honor, Andrea Dean on behalf of the People, calling the case of People vs. Gerald Joseph Palazzolo, State Law number 95-005800-FY.

MR. WEISS: Good morning, your Honor, may it please the Court, Arthur Weiss on behalf of the defendant.

THE COURT: All right, this case was adjourned until today's date for the purpose of reviewing any law that either of you intended to submit.

I have done that, I've read what has been submitted. I'll listen to any further argument if either of you wishes to say anything further?

MS. DEAN: Your Honor, the People would just rely on the briefs filed by Mr. Urbin's office, especially the case of *People vs. Cotton.*

THE COURT: Any further argument?

MR. WEISS: I don't know if the Court has any questions umm...

THE COURT: I have no questions, no.

MR. WEISS: I'll rely on the briefs, then.

THE COURT: All right. As I've indicated, I have reviewed everything that's been submitted. The issue, I think, is fairly well set forth. The issue, basically, is whether or not the People can elevate the crime that's

charged, based solely on statements or admissions or confessions of a defendant.

There apparently is no case, in Michigan, that deals specifically with the offense that is before the Court. There are, however, a number of cases that address the issue in the context of other kinds of crimes.

There isn't any Question, in Michigan, that the Corpus Delicti Rule applies to any crime, that wasn't always the case. Historically the rule applied only to homicide and apparently was originated in those cases involving claimed murders that occurred at sea. The thought was that it was wrong to convict someone, who may have confessed to a murder, when there was no dead body. Be that as it may, the law has evolved to where it is today so it does apply.

As I understand the law in Michigan today, it states that if the People can show, or prove, the core of the crime, the People can elevate it based upon statements made by a defendant.

There's another issue that I suppose I ought to make some comment about, the defense has raised the argument that there's no connection, or nexus, between the statement of the defendant, in this case, to the crime.

I don't buy that argument, I may buy in some cases, but not this one, the People have indicated or submitted, law to the effect that in these kinds of cases date, that is the

date of the offense, is not all that critical. Furthermore, I think in this case it really is a rather hollow argument.

Getting back to the basic issue and that is whether or not the People can elevate this to first degree, based upon the claimed statements of the defendant I think they can. I think the cage of *People vs. Cotton,* as far as I'm concerned, pretty much supports that proposition. I read that case over and over again and it does stand for that proposition.

Certainly in this case if there had been no evidence, of any claimed conduct, that would support a CSC charge of any degree, then the statements of this defendant could not be used, at all.

But inasmuch as there is evidence of the kind of conduct that that would give rise to this charge, his subsequent statement, indicating a more serious charge, I think can be used.

I will bind him over.

MS. DEAN: Thank you very much, your Honor.

MR. WEISS: Thank you, your Honor, objection noted for the record.

THE COURT: All right. Is there any need to talk about bond?

MS. DEAN: No, your Honor, the People would just ask, if a no contact provision has not already been added, that that be added at this time.

MR. WEISS: I think that was part of the original...

THE COURT: That is part of the original bond, so the...

MS. DEAN: Then nothing further, your Honor.

THE COURT: All right.

MR. WEISS: Thank you, your Honor.

STATE OF MICHIGAN)
)ss
COUNTY OF OAKLAND)

I, Janice Aird, Official Court Recorder of the 52/4 District Court, State of Michigan, do hereby certify that the foregoing pages, 1 through 39, inclusive, comprise a full, true and correct transcript in the matter of *People vs. Gerald Joseph Palazzolo,* District Court No. 95-005800-FY-2, heard on Monday, January 8, 1996, and Monday, January 29, 1996.

/s/ Janice Aird
Janice Aird - CERO8O2

February 8, 1998

Office of the Prosecuting Attorney

DAVID G. GORCYCA ***John N. O'Brien II***
Prosecuting Attorney *Chief Assistant Prosecuto*
County of Oakland

September 30, 1997

Linda Sherer
Michigan Court of Appeals
109 West Michigan Avenue
P.O. Box 30022
Lansing, MI 48909-7522

Re: Gerald Palazzolo, Court of Appeals Number 206045

Dear Ms. Sherer:

On September 22, 1997, you sent me a letter in the above referenced case regarding the failure to include a copy of the information showing the date of the offense. After reviewing the date of the offense, I discovered that

BEST AVAILABLE COPY

the offense occurred after December 27, 1994. Therefore, the Claim previously filed in this case should be dismissed.

Although I previously sent you a copy of a letter which I sent to defense counsel regarding a stipulation to dismiss the Claim, defense counsel is unable to sign the Stipulation. Therefore, please dismiss the Claim of Appeal on your own motion.

If you have any questions or need additional information, please contact me at (248) 858-0685.

Very truly yours,

DAVID GORCYCA
PROSECUTING ATTORNEY
/s/ Marilyn J. Day
Marilyn J. Day
Assistant Prosecutor

cc: Arthur Weiss

1200 N. Telegraph Road, Pontiac, MI 48341 Telephone: (248) 858-0656
Facsimile: (248) 858-0660